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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

MONTANA TERRITORY

FROM DECEMBER TERM, 1868, TO JANUARY TERM, 1873, INCLUSIVE.

By HENRY N. BLAKE

VOLUME I.

SAN FRANCISCO, CAL.:
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1911

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JUDGES OF THE SUPREME COURT

FROM THE ORGANIZATION OF THE TERRITORY AND DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICES:	APPOINTED:
HON. HEZEKIAH L. HOSMER,	JUNE 30, 1864.
" HENRY L. WARREN,	JULY 18, 1868, vice HOSMER.
" DECIUS S. WADE,	MARCH 17, 1871, vice WARREN

ASSOCIATE JUSTICES:	APPOINTED:
HON. LORENZO P. WILLISTON,	JUNE 22, 1864.
" LYMAN E. MUNSON,	MARCH 11, 1865.
" HIRAM KNOWLES,	JULY 18, 1868, vice WILLISTON
" GEORGE G. SYMES,	APRIL 5, 1869, vice MUNSON.
" JOHN L. MURPHY,	JANUARY 27, 1871, vice SYMES
" FRANCIS G. SERVIS,	SEPT. 21, 1872, vice MURPHY.

OFFICERS OF THE SUPREME COURT

FROM THE ORGANIZATION OF THE TERRITORY.

CLERKS:

A. M. TORBET,	Appointed	MAY 17, 1865.
J. ALLEN HOSMER,	"	AUGUST 6, 1866.
LUCIUS S. PECK,	"	JUNE 12, 1867.
ISAAC R. ALDEN,	"	JANUARY 13, 1870.

UNITED STATES MARSHALS:

GEORGE M. PINNEY,	Appointed	FEBRUARY 20, 1865
NEIL HOWIE,	"	MARCH 18, 1867.
WILLIAM F. WHEELER,	"	DECEMBER 21, 1869.

UNITED STATES ATTORNEYS:

EDWARD B. NEALLEY,	Appointed	JUNE 22, 1864.
MOSES VEALE,	"	APRIL 20, 1867.
ALEXANDER E. MAYHEW,	"	JULY 11, 1868.
HENRY N. BLAKE,	"	APRIL 22, 1869.
CORNELIUS HEDGES,	"	MARCH 3, 1871.
MERRITT C. PAGE,	"	MAY 17, 1872.

REPORTER:

HENRY N. BLAKE, appointed JANUARY 9, 1879

RULES OF THE SUPREME COURT.

Adopted at the January Term thereof, A. D. 1871.

I. In all cases where an appeal is perfected, and the statement settled (if there be one) twenty days before the commencement of the next succeeding term of this court, the transcript of record shall be filed on or before the first day of such term.

II. If the transcript of the record is not filed within the time prescribed, the appeal may be dismissed, on motion, upon satisfactory evidence of such omission.

A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the respondent.

III. On such motion to dismiss the appeal, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from; the date of its rendition; the fact and date of the filing of the notice of appeal; the fact and date of filing the undertaking on appeal; the fact and time of settlement of the statement, if there be one; and also that the appellant has received a duly certified transcript, or that such transcript has not been requested by appellant; or, if requested, that appellant has not paid the fees therefor, if such payment have been demanded.

IV. All transcripts of records hereafter sent to this court shall be on paper of uniform size, according to a sample to be furnished by the clerk of this court, with a blank margin one and a half inches wide, at the top, bottom and side of each page, and all pleadings, proceedings and evidence shall be chronologically arranged, and the pages of the transcript shall be numbered, and but one side of the leaves shall be written upon.

V. Each transcript shall be prefaced with or have annexed an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and shall have blank or fly sheet covers.

VI. The transcript shall be fastened together on the left side of the pages, so that the same may be secured and every part conveniently read.

VII. The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

VIII. The party filing the transcript may, if he so desire, have the same printed, but the expense of printing shall not be allowed or taxed as costs.

IX. No transcript which fails to conform to the requirements of these rules shall be filed by the clerk.

X. The transcript, on appeal from a final judgment, shall contain copies of the notice of appeal; the undertaking or undertakings executed by appellant on the appeal; the pleadings on which are formed the issues tried in the cause; the statement, if there be one; and such other parts of the judgment roll as are necessary to present or explain the points relied on, and no more.

On appeal from a judgment rendered on an appeal, or from an order, the transcript shall contain copies of the notice of appeal; the undertaking or undertakings filed by appellant; the judgment or order appealed from, and of the papers used on the hearing in the court.

XI. The appellant shall be charged with the duty of having the transcript perfected in accordance with the statute and these rules: Provided, That if it shall appear to the satisfaction of the court that the appellant has filed his *præcipe* in time with the clerk of the court below, directing the preparation of the transcript, and specifying what portions of the record the same shall contain, then, in case the transcript shall be imperfect and shall not conform to the requirements of the *præcipe*, and sufficient reason for such nonconformity does not appear, the appeal shall not be dismissed, and on motion of the appellant, a rule shall be entered upon the clerk below to correct the transcript within such time as may be allowed by the court below.

XII. For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and, upon good cause shown, obtain an order that the proper clerk certify to this court the whole or part of the record, as may be required. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be

accompanied by an affidavit, showing the existence of the alleged error or defect.

XIII. Proof of service of notice of appeal on the respondent may be made by affidavit, and in all cases proof of service of such notice or waiver thereof shall be filed in this court five days at least before the commencement of the term to which the appeal is taken.

XIV. Exceptions to the transcript, statement, undertaking on appeal, notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the errors assigned, must be taken at least one day before the day on which the cause may be set down for hearing, and must be noted in writing and filed at least one day before the argument, unless the appellant otherwise consent, but in all cases such objection must be presented to the court before the argument on the merits.

XV. Upon the death or disability of a party, or transfer of his interest in the suit, pending an appeal, such fact shall be suggested in writing to the court; and if the cause of action survive or continue, upon motion of the legal or personal representative of such party, or of any party to the record, an order shall be made substituting such representative in the cause, and the cause shall proceed as in other cases.

XVI. The calendar of each term of this court shall consist only of those causes in which the transcript shall have been filed in this court five days before the commencement of the term, unless by written consent of the parties: Provided, That all cases in which the appeal is perfected as provided in rule first, and the transcript is not filed five days before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript, during the first week of the term.

XVII. Causes shall be placed on the calendar in the order in which the transcripts are filed, and, except when brought to hearing upon notice or agreement of the parties, shall be disposed of in the order in which they appear upon the calendar.

XVIII. The appellant and respondent shall furnish to each other a copy of his points and authorities, at least one day before the commencement of the argument; and, at or before the commencement of the argument, shall furnish to each of the justices a copy of the same, and shall file a copy of the same with the clerk: or either party may file one copy thereof with the clerk, who shall

cause the requisite copies to be made, and in case either party shall fail to furnish such copy to the opposite party, as required by this rule, he shall be deemed to waive his right to argue such cause orally, except by consent; and no brief of his points and authorities, not filed in accordance with this rule, will be considered by the court, except after at least one day's notice of the filing of the same to the opposite party, who shall have such time as may be allowed by the court, after the filing thereof, to file a reply thereto.

XIX. When briefs or arguments are filed, one copy shall be delivered to the adverse party, one to each of the justices, and one to the reporter.

XX. No more than two counsel will be heard upon a side, and not over one and a half hour on a side for argument will be allowed, unless permission be asked and allowed before the argument commences.

XXI. The records and reports must, in all cases, show whether a decision was made by a full bench, and which of the judges, if either, dissented therefrom.

XXII. When the court takes a case under advisement, it shall file its opinion at the next term thereafter. No cause is decided until the opinion in writing is filed with the clerk.

XXIII. In any case, if the court is satisfied from the record that the appeal was taken for delay, such damages shall be awarded as may, under the circumstances, be proper, and as shall tend to prevent the taking of appeals for delay.

XXIV. Appeals in criminal cases shall take precedence of all other business.

XXV. When a judgment of the supreme court is rendered, such judgment and the opinion, when finally corrected, must be recorded, and a certified copy of the judgment, with proper instructions, must be forthwith remitted to the clerk of the district court in which the judgment appealed from was rendered, and a copy of the opinion shall be remitted, upon application of either party, and payment of the costs thereof, within ten days after the close of the term at which such opinion was filed.

XXVI. In case any justice of this court, while holding a district court, shall refuse to allow an exception, or to certify to a statement, in accordance with facts, upon presentation to this court, or to any two justices thereof, in vacation, of a petition verified by the affidavit of any person aggrieved thereby, or by the attorney of such

person, this court, or such justices thereof, shall, if sufficient reason appear therefor, sign an order granting leave to such person to prove the facts in relation to such exception or statement. Such proof shall be made by deposition, taken after three days' notice to the opposite party, or his attorney, of the time and place of taking the same, which shall contain a copy of the order granting such leave, and within ten days after the taking of such depositions shall be concluded, the opposite party may, after like notice and in like manner, take depositions of witnesses in relation thereto. Such depositions shall be taken and certified before the same persons and in the same manner, in all respects, as is provided by law in the case of depositions taken within this territory.

XXVII. All motions for rehearing shall be in writing, and filed within three days after the judgment is rendered or order made, and during the term at which the judgment or order is rendered or made.

XXVIII. No transcript or paper filed in a cause shall be taken from the court room or clerk's office, except by written order of the court, or one of the justices.

XXIX. The party filing the transcript shall be primarily liable for costs. In no civil case shall the clerk be required to remit the final papers until the costs accrued in this court are paid.

Rules adopted at the August Term, A. D. 1871.

I. At or before filing the transcript in each case on appeal, the party filing the same shall deposit with the clerk the sum of twenty-five dollars, to be applied on the payment of the costs in this court.

II. In all cases at law in which the supreme court has original jurisdiction, the *præcipe* for a summons shall specify the rule day upon which the summons shall direct the defendant to appear; and on or before such day the declaration shall be filed; and at the rule day next succeeding, except upon an order or notice from a justice of this court, the defendant shall plead to the same.

III. In cases commenced in this court, which may be tried before a justice of the supreme court while holding a district court in his district, the clerk, upon the application of either party, shall send and certify the case and papers to the court below, where, upon reasonable notice to the other, either party may bring the case to trial.

ATTORNEYS AND COUNSELORS AT LAW,

LICENSED AND ADMITTED FROM THE ORGANIZATION OF THE TERRITORY TO THE JANUARY TERM, 1873.

Arick, Rufus E.	Helena.
Bagg, Charles S.	Deer Lodge City.
Beattie, Alexander H.	Helena.
Beem, Martin†	Virginia City.
Bissell, Gaylord G.†	Virginia City.
Blake, Henry N.	Virginia City.
Borton, Lewis W.†	Virginia City.
Brown, James H.†	Deer Lodge City.
Brown, William L.†	Virginia City.
Bruce, John P.	Virginia City.
Bullard, Massena	Helena.
Burdick, Henry†	Helena.
Burns, H.†	Virginia City.
Callaway, James E.	Virginia City.
Carpenter, A. M. S.	Virginia City.
Cavanaugh, James M.†	Helena.
Chadwick, Walter F	Helena.
Chiles, William H.†	Virginia City.
Chumasero, William	Helena.
Clagett, William H.	Deer Lodge City.
Coleman, George S.	Bozeman.
Comly, Harry R.	Helena.
Cook, Jerry†	Virginia City.
Corum, John W.	Helena.
Cowan, David†	Virginia City.
Cowan, George F	Radersburg.
Cullen, William E.	Helena.
Davis, Alexander†	Virginia City.
Davis, Joseph J.	Bozeman.
Deimling, Francis C.	Virginia City.
Desbeck, John †	Helena.
Dewey, W. W.	Virginia City.
Dimsdale, Thomas J.*	Virginia City.
Dixon, William W.	Deer Lodge City.
Duke, James K.†	Virginia City.
Edgerton, Sidney†	Virginia City.
Edwards, Thomas R.	Bozeman.
Fleshman, Larkin†	Virginia City.
George, A. G. P	Radersburg.

* Deceased. † Removed from Territory.

Harrison, M. B.†	Deer Lodge City.
Hedges, Cornelius	Helena.
Hosmer, Hezekiah L.†	Virginia City.
Hosmer, J. Allen	Virginia City.
Johnston, J. A	Helena.
Kirkwood, William F.	Radersburg.
Lyman, L. B	Helena.
Lovell, William Y.†	Virginia City.
Lowry, Thomas J.	Helena.
Marshall, William I.	Virginia City.
May, George†	Helena.
Mayhew, Alexander E.	Missoula.
McCarty, O. F.†	Virginia City.
McCormick, W. J.	Missoula.
McCullough, J. L.†	Virginia City.
McMath, William L.*	Virginia City.
McMurtry, Louis	Deer Lodge City.
Mead, Christian	Bannack.
More, Elawson C.†	Helena.
Muffly, Theophilus	Virginia City.
Napton, Thomas L.	Deer Lodge City.
Nealley, Edward B.†	Virginia City.
Orr, Sample	Helena.
Page, Merritt C.	Radersburg.
Parrott, R. B.†	Helena.
Pemberton, William Y.†	Helena.
Phelps, E. F.*	Bannack.
Pinney, George M.†	Helena.
Potter, John	Hamilton.
Potts, Benjamin F.	Virginia City.
Reyburn, Lewis C.	Virginia City.
Robertson, R. H.†	Virginia City.
Robinson, J. C..	Deer Lodge City.
Rogers, John H.	Deer Lodge City.
Russell, Thomas V.†	Virginia City.
Sanders, Wilbur F	Helena.
Sharp, L. J.	Deer Lodge City.
Sheffield, Edward†	Nevada.
Shober, John H.	Helena.
Slater, John S.†	Virginia City.
Smith, Green Clay†	Virginia City.
Smith, H. P. A.*	Helena.
Snider, Andrew J.†	Virginia City.
Spratt, James G.†	Virginia City.
Stafford, William M.†	Virginia City.
Stapleton, George W.	Argenta.
Stephens, William J.	Missoula.
Stoddard, E. C.†	Bagdad.
Street, J. H. D.	Bozeman.
Strickland, O. F.†	Virginia City.
Symes, George G.	Helena.
Thoroughman, Thomas†	Virginia City.

* Deceased. † Removed from Territory.

Toole, Edwin W.	Helena.
Toole, Joseph K.	Helena.
Tufts, James†	Virginia City.
Turk, John C.†	Virginia City.
Turner, Charles W.	Bozeman.
Vivion, Robert P.	Bozeman.
Warren, Henry L.†	Virginia City.
Weston, J. R.	Radersburg.
Williams, Henry F.	Bozeman.
Williams, J. J.	Helena.
Williams, R. H.	Bozeman.
Woolfolk, Alexander M.	Helena.
Word, Samuel	Virginia City.

† Removed from Territory.

PREFACE.

THE Territory of Montana was organized by the act of Congress, approved May 26, 1864. The ninth section of this act vests the judicial power in a supreme court, district courts, probate courts and justices of the peace. The supreme court consists of a chief justice and two associate justices.

The first term of the supreme court of Montana was held in Virginia City, the "seat of government" of the Territory, and commenced on May 17, 1865. During the terms that were held from May, 1865, to December, 1868, the opinions of the court in the cases that were determined were rarely delivered in writing. Orders were generally made that the judgment of the court below should be affirmed or reversed. Written opinions were filed in every case that was decided from the December term, 1868, to the January term, 1873. The records of the court before the December term, 1868, are imperfect, and the pleadings, briefs and papers, in a majority of the causes that were heard before this term, cannot be found. For these reasons this volume contains a report of the cases which were argued and determined in the supreme court of the Territory from the December term, 1868, to the January term, 1873.

The act of the legislature, that provides for the reporting of the decisions of the supreme court, was approved January 4, 1872. The second section provides that "the report of such cases shall contain *concise* notes of the points

decided, a statement of the facts taken from the record, when the same are not fully given in the opinion of the court, the names of the counsel, and the opinion of the court." In addition to the duty of reporting the "names of the counsel," an abstract of the briefs of the counsel has been prepared. In performing this labor the reporter regrets that he has been compelled to do an injustice to the attorneys by publishing a digest in lieu of their arguments.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

DECEMBER TERM, 1868, HELD IN VIRGINIA CITY.

Present:

HON. HENRY L. WARREN, CHIEF JUSTICE.
HON. HIRAM KNOWLES, ASSOCIATE JUSTICE.

THOMAS, appellant, *v.* SMITH, Treasurer of Deer Lodge County, respondent.

PRACTICE — *mandamus — appeal from order on referee's report.* No appeal lies from an order of the district court setting aside the report of a referee upon an application for a writ of mandate.

PRACTICE — *mandamus — reference — must be determined by court.* The district court cannot refer an application for a writ of mandate, but must grant or deny the same before an appeal can be taken.

VALIDITY *of statute relating to county bonds.* The act approved November 22, 1867, authorizing county commissioners to call in all outstanding orders against the treasury of their respective counties, and issue bonds in lieu thereof, is valid.

POWER *of commissioners in issuing county bonds.* The county commissioners of a county cannot require the holders of the evidences of its indebtedness to surrender the same. The act approved November 22, 1867, confers upon county commissioners the power to issue bonds in the place of outstanding orders which have been voluntarily surrendered for that purpose.

STATUTE *relating to payment of county warrants not repealed.* The act approved November 19, 1867, entitled "An act defining the duties of county treasurers, and the payment of county warrants," is not repealed by the act relating to county bonds, approved November 22, 1867.

DUTY *of county treasurer — power of county commissioners.* The treasurer must pay, upon county warrants, money in the treasury of the county which is not otherwise appropriated by law. An order forbidding the treasurer to pay such warrants, passed by the county commissioners, is void.

Appeal from the District Court of the Second District, Deer Lodge County.

THOMAS applied to the district court of the second district for a peremptory writ of mandate on April 18, 1868, to compel Smith, the treasurer of Deer Lodge county, to pay a certain warrant. After the answer and replication had been filed the following order was made by the court:

"APRIL TERM, 1868; *May* 12, 1868.

"W. W. Dixon, Esq., an attorney at law, is hereby appointed referee in the application of J. M. Thomas for a writ of mandamus against Addison Smith, treasurer of Deer Lodge county, to report both the facts and the law in the case; to make his report in twenty days.

"*May* 12, 1868.

"L. P. WILLISTON, *Judge.*"

The referee made his report on May 30, 1868, in favor of Thomas.

On February 22, 1868, the board of county commissioners of Deer Lodge county passed the following order, which is referred to in the opinion of the court:

"It is hereby further ordered by the board of county commissioners that the treasurer shall not pay any moneys out of the county treasury, for the purpose of paying off any unpaid county warrants that may have been issued prior to the first day of February, 1868; neither shall he take in payment of taxes or licenses any warrant that may have been issued previous to the date above named.

"*February* 22, 1868.

"G. J. LUCAS,

"*Chairman Board County Commissioners.*"

At the June term, 1868, the court, WILLISTON, J., set aside the report of the referee, and Thomas appealed.

The facts are fully stated in the opinion.

WORD & SPRATT and L. MCMURTRY, for appellant.

Appellant presented his warrant to the treasurer of Deer Lodge county for payment on May 9, 1866, and April 17, 1868. On the last day the treasurer had moneys in his hands sufficient to pay appellant's warrant and refused to pay it. Appellant presented his warrant under section 8, page 518, act 1865, and registered it under sections 2 and 3 of the act of 1867, page 59, approved November 19, 1867.

The first question is, the proper construction of the act approved November 22, 1867, page 234, providing for the bonding of county warrants. Appellant contends that this act only authorizes the county commissioners to call in the outstanding indebtedness, and to fund or bond so much of said indebtedness as may be presented to the treasurer of the county for that purpose by the holders thereof. The holders of the warrants cannot be compelled to bond or fund them. The county commissioners cannot prohibit the treasurer from paying any warrants. This act is not repugnant to the acts of February 9, 1865, and November 19, 1867, cited above. These acts relating to the same subject-matter must be construed together.

Repeals by implication are not favored by law. Sedg. Stat. and Const. Law, 127 *et seq.*; 5 Abb. N. Y. Dig. 93, §§ 199, 200, 201 and 202.

If these acts can subsist together the courts will uphold the prior law. Sedg. Stat. and Const. Law, 127 *et seq.*, 247; *Merrill* v. *Gorham*, 6 Cal. 41.

The intention of the legislature is to be searched for in the words of the statute. Sedg. Stat. and Const. Law, 243 *et seq.*; 5 Abb. N. Y. Dig. 79, § 31.

The law under which appellant presented his warrant formed part of the contract between him and the county. His right to receive payment became vested when he complied with the law. The legislature cannot by any subse-

quent act impair its obligation by requiring other conditions to be performed, which were not required by the law of the contract itself. *Robinson* v. *Magee*, 9 Cal. 81.

The previous acts of the legislature, providing that appellant's warrant should be paid in the order of its presentation or registry, appropriated the county funds to that purpose. The county commissioners cannot change this order of payment. *Laforge* v. *Magee*, 6 Cal. 285.

The act of November 22, 1867, authorizing the funding of county indebtedness, is unconstitutional and void. It delegates to the county commissioners legislative powers. 17 Mo. 530.

The order of the county commissioners, forbidding the treasurer to pay warrants issued prior to February 1, 1868, is void. It is an exercise of legislative power. It repeals and annuls the acts of the legislature. No such power is conferred upon the commissioners by any statute.

The act of November 22, 1867, and the orders of the county commissioners thereunder, impair the obligation of the contract between the county and the holders of warrants. *Robinson* v. *Magee*, 9 Cal. 81; *Laforge* v. *Magee*, 6 id. 285, 650; 17 Mo. 530.

What is termed the policy of the government, with regard to any particular legislation, is generally a very uncertain thing. Sedg. Stat. and Const. Law, 308; *Hadden* v. *The Collector*, 5 Wall. 111.

SHARP & NAPTON and J. C. ROBINSON, for respondent.

The decision of the court below in setting aside the report of the referee is correct. It is clearly settled that it is not necessary to the repeal of a law that it should be done in terms, nor that one law should be directly repugnant to the other. 1 Kent's Com. 462; *Pierpont* v. *Cranch*, 10 Cal. 316: *Sacramento* v. *Bird*, 15 id. 295; *Appeal of N. B. & M. R. R. Co.*, 32 id. 515.

The intention of the legislature, when it can be ascertained, must govern in the construction of statutes. That

intention must be gathered from the act itself. Sedg. Stat. and Const. Law, 229–234, 293–298; *Schofield* v. *White*, 7 Cal. 400; Smith Stat. and Const. Law, 649; *Knowles* v. *Yeates*, 31 Cal. 86.

Where there are two statutes of different dates upon the same subject, and full force and effect cannot be given to both, the latter operates as a repeal of, and destroys the force and effect of the former. Whenever a power is given by statute, every thing necessary to attain the end is implied. 1 Kent's Com. 524.

The act of November 22, 1867, gives the commissioners the authority to call in *all* indebtedness. Webster defines authority to be legal power, or a right to command or to act, as the authority of a prince over subjects, etc. The intention of the legislature in making the law of November 22, 1867, was to prescribe the only mode of payment. It not only gives the authority referred to, but further provides that all bonds shall draw interest and be paid in seven years. The creditors are compensated for the delay in enforcing their remedy. It cannot be that it was only intended to empower the commissioners to fund or not, at the pleasure of the scrip holder. If so, they would have been allowed to bond on the best terms they could. They must pay fifteen per cent per annum interest. Appellant's construction would simply give commissioners the power to compromise the county indebtedness and borrow money, which they can do under the acts of 1865, page 500, section 14. Section 8 of the acts of 1865, page 518, is in conflict with sections 3 and 6 of acts of 1867, page 234.

There was no necessity for a repealing clause as the bonding act was ineffectual until acted upon by the county commissioners. The commissioners have ordered the bonding of the county warrants under the law, and declared that they will only pay by bonding, which renders the law effectual. The subject of this action is included in the warrants thus ordered bonded.

To sustain both acts, as contended for by appellant, would virtually render the last of no effect whatever. A statute

should never be so construed as to render it a nullity Smith Stat. and Const. Law, §§ 671, 672.

Remedial statutes should be largely and liberally construed. Smith Stat. and Const. Law, §§ 547, 709, 710.

The legislature has the right to alter the remedy, if it does not thereby impair the right and make the remedy hardly worth pursuing. *Smith* v. *Morse*, 2 Cal. 549. The legislature may fund the debt of a county. *Hunsacker* v. *Borden*, 5 Cal. 288; *Chapman* v. *Morris*, 28 id. 394.

The record shows that appellant's right never became vested.

The legislature did not delegate legislative power to the county commissioners in leaving it discretionary with them to fund the county indebtedness. *Blanding* v. *Burr*, 13 Cal. 358; *Chapman* v. *Morris*, 28 id. 394.

County commissioners understand the wants of their county better than the legislature. The action of the commissioners was not legislative in its character, but simply ministerial. They complied strictly with the funding act. *Upham* v. *Supervisors Sutter County*, 8 Cal. 378; *Emery* v. *San Francisco Gas Co.*, 28 id. 348.

Any one interested could have compelled the commissioners to fund if they had refused. *City of New York* v. *Furze*, 3 Hill, 612.

WARREN, C. J. This was an application on the affidavit of appellant to obtain a writ of peremptory mandamus out of the district court of the second judicial district, in and for the county of Deer Lodge, directed to the respondent, treasurer of said county, to compel the payment out of the county treasury to appellant of county warrant numbered 364, drawn by the county commissioners of that county on the treasurer for the sum of $213.20, payable to C. E. Irvine or order, out of any moneys in the treasury of said county, and dated May 9, 1866.

The affidavit alleges legal ownership of the warrant by appellant, its presentation on the 9th day of May, 1866, to the then treasurer for payment, and non-payment for

want of funds, and avers that afterward money was received by the respondent as such treasurer, which was appropriated by law to the payment of said warrant; and that appellant, on April 17, 1868, presented same to respondent, who had previously as such treasurer received money appropriated by law to pay said warrant, for payment, and who then refused to pay same.

Some matters of practice hereafter noticed make it necessary to detail the history of the case.

In his amended answer respondent specially denies:

1. That he had at the time of answering, or had had since the commencement of the action, any money in his hands or custody appropriated by law to payment of the warrant; and,

2. That he had at any time received any money appropriated by law to payment of same.

For further answer he sets up the act of the legislative assembly, entitled "An act to authorize the county commissioners of the several counties of the Territory of Montana to fund the debt of their respective counties," approved November 22, 1867, and two orders made under color of that act by the board of county commissioners of Deer Lodge county, which are set out in the answer, the first bearing date February 1, 1868, and the other February 22, 1868. The first order recites that the commissioners, deeming it for the interest of Deer Lodge county that all the outstanding orders against the treasurer of said county be called in, do order that all outstanding orders against the treasurer of said county be called in, and that bonds, with coupons payable semi-annually, be issued in lieu thereof, by virtue of, and in conformity with, the act of the legislative assembly of November 22, 1867; and further, that $3,000 be set apart from the ordinary revenue of the county for the year 1868, for the payment of the outstanding bonds against the treasury of said county and the interest thereon. The second order forbade the county treasurer to pay any money out of the treasury for the purpose of paying off any unpaid county warrants issued prior to February 1, 1868, or to receive such warrants in payment of taxes or licenses.

The answer avers that both these orders of the board were made prior to the presentation of the warrant in question to respondent for payment.

To this answer respondent filed a replication, and the cause was referred, by order of the court, to a referee "to report both the facts and the law of the case," who afterward filed a report including finding of facts and conclusions of law, and recommending that an order of court be made for a peremptory mandamus to respondent in accordance with the application. To this report of the referee respondent excepted, assigning errors, and moved to set the report aside, and for a new trial.

Upon this motion the court rendered what purports to be a judgment, reviewing the conclusions of law reported, and concluding as follows: "We feel impelled in the brief time we have to investigate the question to dissent from the report of the referee. We, therefore, sustain the exceptions (except the one rejecting evidence), and set aside the report of the referee."

To this order, or decision, appellant noted his exception.

This is all the transcript shows, except the following stipulation of the parties under which the proceeding is brought before this court:

"It is stipulated and agreed by and between the parties hereto as follows:

"1. That the cause be taken by appeal to the supreme court of the Territory, upon the decision and order of the judge of said district court setting aside the report of the referee in this cause, and the order of said judge granting a new trial thereon.

"2. That all errors and defects in the pleadings in said cause be and the same are hereby waived, and the court is hereby authorized and requested to order said appeal in accordance with these stipulations."

We have thus detailed the proceedings in the cause, because, as an appellate court, we are met at the outset by a difficulty as to what questions are presented in this transcript for the adjudication of this court.

No appeal lies from the mere order or decision setting aside the report of the referee; and, though recited in the stipulation, the transcript fails to show any further order granting or denying the application, granting or refusing a new trial, or any final judgment or order whatever from which an appeal would lie. This difficulty arises from the error of the court in ordering a reference of the cause, and subsequently in failing to either grant or deny the application. We will not stop, however, to discuss the validity of a reference of "issues" or "questions" of law, under our code of practice, without consent of the parties entered upon the record. In a proceeding for a mandamus our statute contemplates that questions of fact and of law shall respectively be determined in the manner pointed out — questions of law being for the court. In this case the issues raised on the affidavit and answer are questions of law — the only issue of fact joined being the denial by respondent that he had, prior to the commencement of the action, received money as treasurer appropriated by law to payment of the warrant, and this really involving a question of law. Although the court below did not take such final action as would bring these questions before this court on appeal, yet, regarding them as of interest, and in view of the intention of the parties, as indicated by their stipulation, we will proceed to consider them as presented by the pleadings, treating the report of the referee upon the issue of fact as a special finding of the court, and regarding the order setting it aside as an order denying the application of appellant on the facts as shown by the record.

The respondent bases his refusal to pay the warrant, in substance, upon the orders of the board of county commissioners set out in the answer, and that the money in the treasury was not by law appropriated to such payment.

If those orders of the board were made by competent authority, within the limitations of legislative power, they would, of course, furnish a legal justification of his refusal. To determine whether such is the case, we must first refer to the acts of the legislative assembly conferring powers

upon the commissioners, as it is not contended that they possess any legal powers, except such as may be rightfully conferred upon them by the legislature, in the exercise of its powers under the constitution and acts of congress.

The act of November 22, 1867, is relied upon as conferring this power upon the board. The constitutionality of this statute is questioned by appellant, but, properly interpreted, we regard it as upon a rightful subject of legislation, and within the scope of legislative powers.

It is claimed, however, by respondent that, under this statute, the county commissioners possessed the power to require, by an order, that all holders of warrants, issued prior to the date of their first order, should surrender them for cancellation, and receive bonds in lieu thereof; and that this act, upon the making of such order, in effect repealed all prior laws providing for payment of outstanding warrants out of the treasury, leaving such warrants as were not surrendered unprovided for. We do not so regard it. While we admit the power of the legislative assembly, either by direct laws or through the commissioners, to control the financial affairs of a county, subject only to well established limitations, we would be forced to deny the power claimed to require the surrender of evidences of county indebtedness by the holders on any terms or conditions, whether favorable or unfavorable to the latter. The county revenues might be appropriated by law to other purposes than payment of the outstanding indebtedness, leaving that unprovided for, and whatever violation of moral obligation or of public faith this might be, the creditor, unless in some case of vested right, would be without legal remedy. This subject we have discussed in another case and will not pursue farther.

We do not think the act in question intended a compulsory change of the form of the county indebtedness. In construing a statute it is the duty of a court, where one of two constructions will render it inoperative, or even simply harsh, and another valid, to give it such construction as will sustain it.

We hold, then, that the statute of November 22, 1867, simply conferred upon the commissioners the power, which, without it, they did not possess, to issue bonds bearing liberal interest, and substitute them for outstanding orders, and thus sustain the financial credit of the county. The exchange was not to be compulsory, but dependent on the will of the holders of warrants. In this light it is a wise and just measure; and we fail to see, as is claimed by respondent, how such construction renders the statute nugatory.

The question then recurs as to what were the rights of appellant, if declining to surrender his warrant under the order of the board. Unquestionably to have it paid, according to its terms, out of money in the county treasury not otherwise appropriated by law. The answer of respondent avers that, at the time of the presentation of the warrant to him, he had not in his hands money appropriated by law to its payment. The finding of the referee on this issue was, that "on the 17th day of April, 1868, when demand of payment of plaintiff's warrant was made, by reason of further receipts and the funding of prior warrants, he had received more than sufficient money to pay plaintiff's warrant, supposing that it was entitled to be paid in its regular order, without regard to the funding law and the order of the commissioners."

The money, then, was in the treasury. Was it appropriated by law to the payment of the warrant?

By an act of the legislative assembly, entitled "An act defining the duties of county treasurers, and the payment of county warrants," approved November 19, 1867, it is provided that county warrants "shall be paid in the order in which they are presented" to the county treasurer for payment. It is urged by respondent that this law was repealed by implication by the act of November 22. It is a primary principle that statutes in *pari materia* shall be so construed as that, if possible, all shall stand. The interpretation we have given the latter act removes all conflict between it and the former one, and gives effect to both.

The act of November 22d permitted the commissioners to appropriate but one-fifth of the county revenue annually to payment of bonds, leaving the remainder to be applied in accordance with previous laws. The order of the commissioners, of February 1st, set apart $3,000 of the ordinary revenue of the county for 1868 for the payment of outstanding bonds, and it is to be presumed that amount constituted the one-fifth of the revenue of the county for that year permitted by law to be appropriated for that purpose; if it was more it was unauthorized by the law. The remainder of the revenue, then, was subject to the disposition made by prior laws. The act relating to counties and county officers, approved February 9, 1865, in specifying the duty of the county treasurer, provides that "all moneys received by him for the use of the county shall be paid out by him only on the orders of the board of commissioners, according to law, except when specified provision for the payment thereof is or shall be otherwise made by law." Under this act, and that of November 19, 1867, it appearing that appellant's warrant was entitled to payment in the order of presentation, and that the money in the treasury, at the time of its presentation to respondent for payment, was not set apart under the order of February 1st of the board of commissioners as part of the $3,000, or otherwise appropriated by law, it was the duty of respondent, notwithstanding the last order of the commissioners, to apply it to payment of the warrant.

The judgment of the court below is reversed with costs, and it is ordered that a peremptory writ of mandate issue out of this court, directed to the treasurer of Deer Lodge county, commanding him to pay to appellant, holder of the county warrant hereinbefore described, the amount of said warrant, with interest on the same at the rate of ten per cent per annum from April 17, 1868, out of any money in the treasury not otherwise appropriated by law.

KNOWLES, J., concurred.

Exceptions sustained. Peremptory writ of mandate granted.

The respondent filed a motion for a rehearing, which was denied at the same term for the reasons contained in the forgoing opinion.

LANGFORD, respondent, v. KING, Treasurer of Lewis and Clarke County, appellant.

TERRITORIAL WARRANT—*how paid.* A territorial warrant, duly issued, presented for payment and "not paid for want of funds," in July, 1867, and subsequently sold by the owner, could not be paid by the Territory in money or taxes, at its option, in July, 1868.

TERRITORIAL WARRANTS—*no contract for their payment.* The statute in force in July, 1867, giving the holders of territorial warrants the right to pay taxes with them, was not a contract that they should be so paid.

VALIDITY *of act relating to payment of taxes in money.* The act approved November 19, 1867, which deprives the holders of territorial warrants, not issued in their names, of the right of paying taxes with them, is constitutional.

WHEN *holder of territorial warrant has a vested right.* The holder of a territorial warrant, who presented it in payment of taxes before the passage of the act approved November 19, 1867, acquired a vested right to pay taxes with it.

TERRITORIAL *contracts have no legal obligation.* A citizen cannot sue the Territory and enforce its contracts. They have no legal obligation, but rest upon the good faith of the Territory.

Appeal from the District Court of the Third District, Lewis and Clarke County.

LANGFORD applied to the district court of the third district on August 5, 1868, for a writ of mandate to require King, as county treasurer of Lewis and Clarke county, to accept a territorial warrant in payment of taxes due from Langford. The warrant was duly drawn and issued in favor of Green C. Smith, and presented for payment on July 17, 1867. Smith sold the warrant for a valuable consideration

to Langford, who tendered it, in part payment of his taxes, to King on July 11, 1868. King refused to receive the warrant, because it was not issued in the name of Langford, according to the act approved November 19, 1867, "defining the duties of county treasurers, and the payment of county warrants." Langford then applied for the writ of mandate, which was issued in the alternative on August 15, 1868, by the court, MUNSON, J., who made the following order in chambers:

"This case having been submitted to me for a ruling, under stipulation that the same be taken to the supreme court for final decision, without giving the subject that full consideration its importance demands, and for the purpose of raising the question for the consideration of the supreme court, I do hereby make a ruling in favor of the plaintiff and against the defendant, and, therefore, adjudge that the defendant receive said warrant for said taxes due from the plaintiff, as in said complaint specified."

The parties stipulated in writing that no peremptory writ of mandate should be issued until the final decision of the supreme court had been rendered.

The statutes relating to the subject of the action, and further facts, appear in the opinion.

J. H. SHOBER, District Attorney, Third District, for appellant.

The purpose and manner of issuing territorial warrants, as well as the mode, manner and order of payment of the same, are strictly within the control of the territorial legislature.

The legislature has a right to provide means for defraying the expenses of the territorial government. It must necessarily provide laws for levying and collecting taxes. Hence follows the authority to prescribe in what the taxes shall be paid, money, warrants or both.

The act approved November 19, 1867, does not impair the obligation of contracts. The contract made between the Territory, and the holder of the warrant tendered, was that

he should have $10 paid by the territorial treasurer out of any money in the treasury, not otherwise appropriated. This contract is not impaired by that act. He is required to pay his taxes in money when they become due, but his right to receive the money on his warrant is not affected. One use to which the warrant might have been applied has been destroyed by the act.

The appellant properly refused to receive the warrant tendered by respondent, as it was issued to Green C. Smith, and assigned by him to respondent.

LAWRENCE & HEDGES, for respondent.

Const. U. S., art. 1, § 10. No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. If a State cannot do it, much less can a Territory. This law applies to all contracts between the State and individuals. 1 Kent's Com. 462.

All effectual remedies affecting the interests and rights of owners, existing when the contract was made, become an essential ingredient in it, and are parcel of the creditor's rights, and ought not to be disturbed. All suspension by statute of remedies, or any part thereof existing when the contract was made, is more or less impairing its obligation. tion. 1 Kent's Com. 461–2.

What is the contract contained in this warrant under the law existing at the time it was issued? It is negotiable. The indorsee has all the remedies of original payee. Section 14, page 57, and section 1, page 59, of the act of 1867, do not apply to warrants issued prior to November 1, 1867, or they are unconstitutional.

The warrant is in the form authorized by law, and is receivable for full amount of taxes payable into territorial treasury. Acts 1865, pp. 408 and 422, § 35; also, p. 528, § 16.

County treasurers are collectors of taxes and licenses due the Territory. Act 1865, p. 421, §§ 34, 35; act 1867, pp. 45, 240.

The holders of such warrants are deprived of all remedy. Act 1867, pp. 53, 57, 59.

KNOWLES, J. This cause comes to this court on appeal from a judgment awarding the respondent a peremptory writ of mandamus, commanding the appellant to take in payment of the Territory's proportion of a license, territorial warrant No. 458, for $10, issued July 2, 1867, to Green C. Smith.

On the 2d day of July, 1867, the following statutes of this Territory were in full force, viz.: Sections 2 and 5 of "An act to provide for the expenses of Montana Territory." They read as follows:

"§ 2. That the treasurer shall pay, out of any funds in his hands applicable to such use, the amount stated as due in the auditor's warrants, only in the order in which they are drawn according to priority of date; provided that all warrants are receivable into the treasury in payment of any taxes, licenses or other dues due the Territory.

"§ 5. That the warrants drawn by the auditor of this Territory on the treasurer shall be received by the sheriff or collector of the revenue in payment of taxes, fines and penalties, or other dues to the Territory, at par, and shall be received from such officer by the treasurer in settlement of revenue due from such sheriff or collector of the Territory."

Also section 35 of "An act providing for the collection of the revenue." That part of it which refers to territorial warrants is as follows:

"Auditors' warrants are receivable for the full amount of taxes payable into the territorial treasury."

After the issuing of this warrant to Smith, and before the tendering of it to appellant by respondent in payment of the Territory's proportion of a license, the following statute was enacted, viz.:

"§ 1. That, from and after the passage of this act, all taxes and licenses due this Territory, or any county thereof, shall be paid in money at the time the same may become due; provided that any person or persons who may have rendered services to the Territory, or any county thereof, and who hold warrants issued therefor in his or their

names, shall have the privilege of paying his or their taxes or licenses with such warrants, in proportion of sums due the proper county or Territory."

Section 7 of this act provides that "all acts and parts of acts conflicting with this act are hereby repealed." See Statutes of Fourth Legislative Assembly, p. 59.

The first question presented to us is: Did the Territory contract with Smith that this warrant should be received by it in payment of taxes or licenses? If we consider the warrant itself, we have no difficulty in saying the Territory never made any such contract. The form of the warrant is in accordance with the provisions of law. See Statutes of First Legislative Assembly, 408. It is as follows:

No. 458.

TERRITORY OF MONTANA, MADISON COUNTY, }
VIRGINIA CITY, *July* 2, 1867. }

The treasurer will pay to Green C. Smith or order ten dollars, out of any moneys in the Treasury not otherwise appropriated. Presented for payment.

July 17, 1867. JNO. H. MING,
Territorial Auditor.

JNO. S. ROCKFELLOW,
Territorial Treasurer.

It is contended, however, that those statutes existing July 2, 1867, enter into and are a part of this contract. It is true that laws do enter into and form a part of contracts made during their existence, when parties have left any thing to be supplied by law.

But when parties have made and entered into contracts which are not illegal, the law never enters into them to vary or add to them, so as to make the contract different from what the parties have made it themselves. See 2 Pars. on Cont. 27. Laws give effect to the contracts parties themselves have made. If those laws added to this contract so as to bind the Territory to receive this warrant in payment of taxes, then it also added to the obligations of the receiver of the warrant, and bound him to pay it over to the Territory, on demand, for taxes due the Territory, for the obliga

tions of such contracts are mutual. We think no one, upon a careful examination of those provisions of the statute and this warrant, can come to the conclusion that the Territory has the power to pay it in money or in taxes, at its option. If not, then it was no part of this contract that this warrant should be received in payment of taxes. We might proceed at some length to analyze each one of those provisions of the statute, cited above, and show that they cannot have the effect claimed by respondent. We deem it sufficient, however, to say that they are general laws, which, for reasons of public policy, gave the holders of warrants the *privilege* of paying them over in liquidation of taxes. And as such they would form no part of this contract. See Sedg. on Stat. and Const. Law, 618, 633.

But let it be granted that the Territory did contract with Green C. Smith that this warrant should be paid out of any moneys not otherwise appropriated, or that it might be paid over in liquidation of taxes. Is that law, repealing those provisions of the statute which gave this right of paying over this warrant in liquidation of taxes, void, as violating that provision of the Constitution of the United States prohibiting States from passing any law impairing the obligations of contracts? What is the obligation of a contract? It is that which gives the parties thereto the legal power to enforce it. See 3 Pars. on Cont. 555, note *s*. Montana Territory is a government created, it is true, by a law of Congress. Yet that law gives it very extensive powers. The reason of the law, which declares that no government can be sued without its consent, applies to this territorial government as well as to any other government.

We hold, therefore, that unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it. There is no law of this Territory or act of Congress permitting it. There is, then, no legal power to enforce territorial contracts. In other words, there is no obligation to territorial contracts. They rest simply upon the good faith of the Territory. Hence, there was no legal obligation on the part of the Territory to take

this warrant in payment of taxes; and the law which took away this right of paying it over in liquidation of taxes, did not impair the obligation of the contract, because there was no legal obligation to this contract, whatever the moral obligation may have been. Had the warrant been presented in payment of taxes before the repeal of the law giving this right, the right would then have become a vested one, and a different question would have been presented to us. In support of these views, see *Hunsaker* v. *Borden*, 5 Cal. 288; *Myers* v. *English*, 9 Cal. 341.

In accordance with these views, we hold that the statute which provides that all taxes, licenses and dues payable to the Territory should be paid in money, unless the person owing the tax or license should hold a warrant, issued to himself, for services rendered the Territory by him, was not void as to this warrant. The appellant, as tax collector, was, therefore, bound to obey it, and to refuse to receive this warrant in payment of the Territory's proportion of a license. Hence the district court erred in awarding the respondent the peremptory writ of mandate.

The judgment of the court below is, therefore, reversed, with costs, and the peremptory writ of mandate denied.

WARREN, C. J., concurred.

HUTCHINSON, respondent, *v.* HAMPTON et al., appellants.

RECEIVER — *pay taxed as costs.* A receiver of property in controversy in an action cannot recover judgment for his services against all the parties, by a motion in the original suit. He is an officer of the court, and his compensation should be allowed out of the property in his hands, or taxed as costs.

Appeal from the First District, Madison County.

THE parties stipulated in writing that this cause should be heard on appeal on the original papers. The appellants

appealed from the judgment of the district court, HOSMER, J., affirming the report of the referee in favor of Hutchinson.

The facts are contained in the opinion.

DAVIS & THOROUGHMAN, for appellants.

H. N. BLAKE, for respondent.

WARREN, C. J. This appears upon the calendar as an action in which Hutchinson is plaintiff and appellee, and Columbus Hampton and others are defendants and appellants. It appears from the record that Norval Harrison *et al.* were plaintiffs, and J. M. Chase *et al.* defendants in an action pending in the first judicial district court, in Madison county, and that Hutchinson was appointed, by consent of parties, receiver of the property in controversy in that cause, and that he acted as such ; and applied, at the termination of his duties, to the court for the allowance to him of $330, as compensation for his official services. This application was referred to a referee, who heard testimony and filed his report, finding the facts, reporting $346.72 to be due the receiver, and reporting, as a conclusion of law, that all the parties, plaintiff and defendant in the action, were liable to him for that amount. To this report the appellants, or some of them, excepted ; their exceptions were overruled, and judgment was entered by the court upon the report of the referee, for the sum of $346.72, in favor of Hutchinson as plaintiff, and against all the parties to the action as defendants, together with costs of the reference, and that execution issue therefor. From this judgment appellants have not properly prosecuted their appeal, but a stipulation is filed in this court by the attorney of Hutchinson, waiving all errors, and submitting the questions involved to this court.

The court below erred in entering the judgment against all the parties. There was no action pending in which such judgment could be rendered. If Hutchinson performed services at the request of these parties, his remedy was by

suit against them, in the ordinary manner, not by motion in a separate action.

If he performed services as a receiver, whether appointed by consent of parties or otherwise, he became for that purpose an officer of the court, and his compensation should have been allowed by the court out of the property in his hands, or taxed as costs in the case. Rejecting the conclusion of law of the referee, from the facts found it appears that Hutchinson acted in the capacity of receiver in the cause referred to; and that, deducting the interest, there was due him, as compensation to which he was reasonably entitled, the sum of $301.50. This amount should have been allowed him, and taxed as costs in the cause in which he acted as receiver.

The judgment of the court below is modified, so as to accord with this opinion, and the clerk of that court is directed to tax the amount hereby found due to Hutchinson as receiver, as costs in the cause in which he acted, in which Norval Harrison *et al.* were plaintiffs, and J. M. Chase *et al.* were defendants.

Judgment modified.

KNOWLES, J., concurred.

TERRITORY OF MONTANA, respondent, *v.* DRENNAN, appellant.

ASSAULT WITH DEADLY WEAPON — *defense.* On the trial of a party indicted for an assault with a deadly weapon, with intent to inflict upon D. a bodily injury, it is not a defense, nor a part of the *res gestæ*, that D., before the assault was committed, had wrongfully deprived defendant of the use of water, and thereby prevented him from working his mining ground.

Appeal from the Second District, Deer Lodge County.

DRENNAN was tried in May, 1868, in the second district, upon an indictment for an assault with intent to inflict upon Patrick Dalton a bodily injury. He was convicted in the

district court, WILLISTON, J., to whose rulings, upon the admission of evidence, the defendant filed exceptions, which are contained in the opinion of the court.

J. A. JOHNSTON, for appellant.

Defendant had a right to show that he was possessing and using the water and mining claim, at the time of the assault committed upon Dalton, in mitigation of the offense. *People* v. *Payne*, 8 Cal. 341; *People* v. *Costello*, 15 id. 350.

W. J. STEPHENS, district attorney, second district, for respondent.

No brief on file.

KNOWLES, J. Michael Drennan, the above-named defendant, was indicted for the crime of assaulting, with intent to do great bodily injury, on Patrick Dalton, and was tried and convicted of the same. The only error complained of by the defendant is the refusal of the court to admit, on the trial, the evidence set forth in the following exceptions, to wit:

"Be it remembered that on the trial of this cause, the defendant, Michael Drennan, introduced as a witness in his behalf one John Stoner, by whom he proposed to prove that the defendant was owner of a mining claim in Washington gulch, in Deer Lodge county; and that he was at work mining on the same at the time of the commission of the alleged assault; and that he was using the natural water of said gulch for the purpose of working his said claim; and that Peter Dalton, upon whom said assault was alleged to have been committed, without any right so to do, shut off the water of said gulch, out of and away from the same, so that this defendant was deprived of the use of the same, and thereby prevented from working on his said claim; which said testimony of John Stoner was proposed to the court by the defendant, to be corroborated by a number of competent witnesses. The attorneys for the prosecution objected; which said objection was, by the court, sustained; to which said ruling of the court the

counsel for the defendant then and there objected, and ask that this, their bill of exceptions, be signed and made a part of the record."

The only grounds upon which such testimony would be admissible are: 1. That it was a defense to the charge in the indictment; or, 2. That it was a part of the *res gestæ*.

Should it have been admitted as a defense? It is true that when a party is in the act of committing a forcible trespass upon the person of another, or property of which he is in possession, force may be used by the assailed sufficient to repel the trespass. But it does not appear, from the testimony offered, that Patrick Dalton was in the act of committing a trespass upon the property of the defendant, of which at the time he was in possession, and that, to repel this trespass, he was compelled to use the force he did. The evidence goes to show that Dalton had already shut off the water from the defendant's claim, and deprived him of the use of it, when he sought to redress his grievance by shooting Dalton. It certainly does not appear that the defendant did this shooting in repelling a forcible trespass upon his property, of which he was in the actual possession, which Dalton was at the time in the act of committing. If the defendant had offered to prove such facts, they would certainly have been admissible. The fact that the defendant, while he was in possession of, and working his mining claim, shot Dalton because he had shut off the supply of water in the gulch, which the defendant may have been entitled to, is surely no justification of the offense charged in the indictment.

Were the facts set forth in the exception a part of the *res gestæ?* What defense of the defendant do they explain or elucidate? There is none presented to us in the record. We have already seen that they are no defense. How do they present the principal act, namely, the shooting, in a favorable light? It is not apparent to us. These facts might have been, perhaps, introduced by the prosecution, to show malice, and the motives which impelled the defendant to commit the offense. But to entitle the defendant to insist

upon the introduction of these facts as part of the *res gestæ*, they must be necessary to elucidate or explain some defense of the defendant. As such a necessity does not appear in the record, we are compelled to hold that the court below properly refused to admit the testimony.

The judgment of the court below is, therefore, affirmed.

Affirmed.

WARREN, C. J., concurred.

CHRISTNOT, respondent, *v.* MONTANA GOLD AND SILVER MINING CO., appellant.

MECHANIC'S LIEN — *accounts — appropriation of payments.* A person who performs labor for another under a contract, and is entitled to a lien for a part of said labor, and can have no lien for the remainder, can charge therefor under two distinct accounts. If the debtor, at the time of the payment of any sum, fails to appropriate the same to either of these accounts, the creditor can do so before he makes out and files his lien.

Appeal from the First District, Madison County.

CHRISTNOT commenced this action against the defendant, a foreign corporation, to recover for services performed by him under a contract made with its managing agent in Montana, and have the same adjudged a lien upon the quartz mill of defendant. The defendant admitted that the amount sued for was due, but denied that plaintiff was entitled to a lien as a mechanic upon its property. The action was tried in the district court. WARREN, J., and plaintiff obtained a judgment in December, 1868.

The other facts are stated in the opinion of the court.

W. F. SANDERS and H. N. BLAKE, for appellant.

The respondent did not perform all the services upon the appellant's mill. The statement shows that some of his time was occupied in making sleds, ox frames, mining tubs, and cutting logs and working upon buildings not owned by appellant. The court below should have separated the items of respondent's account, and determined what amount should be a lien upon the mill, and what amount should be

a lien upon other property of appellant. The amount that was not a lien should have been found by the court.

The statute requires a mechanic to perform his labor upon the building, which he seeks to incumber with his lien. Acts 1865, 332, § 1. Respondent's work upon sleds, ox-frames, tubs, etc., could not, under this statute, be a lien upon the mill or any buildings of appellant. Respondent's work upon buildings owned by his brother and father could not be a lien upon appellant's property.

Respondent never made any legal appropriation of appellant's payments to him in discharging his claims for labor upon sleds, desks, tubs, etc. "Said appropriation was done by advice of his counsel *at the time the lien was drawn up.*" Statement. Christnot should have made a specific appropriation of the money at the time he received it from appellant, if it was due to him on distinct accounts. The doctrine of appropriation applies only when the accounts are distinct in themselves, and are so regarded and treated by the parties. If the whole may be treated as a continuous contract, payments are generally applied to the earlier items of the account. 2 Pars. on Cont. 629–633.

Appellant had no knowledge of any pretended appropriation by respondent. Statement. Respondent could not appropriate the payments, as claimed, without the knowledge of appellant. 2 Pars. on Cont. 631.

The requirements of the statute, securing the lien to mechanics, must be strictly complied with. *Bottomly* v. *Rector*, 2 Cal. 91, 3 Pars. on Cont. 276; *Blythe* v. *Poultney*, 31 Cal. 234.

Respondent must prove that he has a mechanic's lien upon appellant's mill. The contract for constant employment, found by the court below, does not affect his right to the lien claimed. If it is impossible to ascertain what proportion of the judgment can become a lien upon appellant's property; or, if services for which respondent might have a lien are combined with other charges for which no lien is given, respondent loses the benefit of the statute. *Edgar* v. *Salisbury*, 17 Mo. 271.

W. M. STAFFORD and WORD & SPRATT, for respondent.

Respondent worked as a mechanic, under a contract, for appellant. No act of appellant could remove his liability to respondent until there had been a breach of or refusal to comply with the contract on respondent's part. The statute securing a lien to mechanics is intended to afford the laborer an opportunity to secure payment for his services. The lien accrues where the liability attaches, whether the work has been done under contract or otherwise. Where a contract exists, the act of the employer, preventing the laborer from fulfilling his part of the contract, will not affect the rights of the laborer under the lien law.

Respondent made tubs, etc., during the existence of appellant's contract to pay him five dollars per day until the mill was completed, and his right to a lien was not impaired thereby. The court has determined the amount that should be secured by a lien, and that the remainder has been paid.

Respondent had the right to appropriate all payments made by appellant on his account. If neither party makes a specific application of the money, the law appropriates it, according to the justice and equity of the case. Payments are not applied to the earlier items of an account, if a different intention can be gathered from the circumstances of the case. There are many exceptions to the rule that payments made generally are presumed to have been made in discharge of the earlier items of an account. 2 Pars. on Cont. 631–633; Chitty on Cont. 645, 649, and notes.

It is conceded that respondent appropriated the payments made to him by appellant before filing his lien and bringing this suit. The law fixes no time for the creditor to make the appropriation of the payments. Respondent could make it at any time, if the rights of third persons were not affected. Chitty on Cont. 645, n. 2.

KNOWLES, J. The respondent Christnot brought an action in the court below to foreclose a mechanic's lien upon a quartz mill of the appellant, the Montana Gold and Silver Mining Company. The court gave the respondent judg-

ment, and a decree for the sale of said mill property to satisfy the same.

The appellant made a motion for a new trial, which the court denied; from which order the appellant appealed to this court.

From the evidence set forth in the bill of exceptions, it appears that the respondent entered into a contract with appellant to perform mechanical labor on and about the said quartz mill of appellant, for $5 per day; that this was less than the usual price, but was consented to by respondent on the promise of constant employment; that he performed, under the orders of the agent of the appellant, work upon a house for the agent; that at different times he worked at making sleds, ox frames, tubs and cutting logs for the appellant, etc.; that respondent worked on the mill one hundred and ten days; that appellant paid him certain amounts on his labor; that at the time of making out his lien, he appropriated these payments, first, in liquidation of the account for labor not performed on the mill, and then in payment for the labor on the mill, so far as it would go. It is not denied there is still due respondent, on all the labor performed, the balance he claims. It is not contended that the appellant at any time appropriated these payments.

The main question presented in this case is, had the respondent the right to appropriate the payments to him in liquidation of the labor performed by him not on the mill.

It is contended by the appellant that the account between respondent and appellant was one, not different accounts; and that the respondent had no right to select out certain items, and apply the money he received in payment of them. The evidence shows that the respondent was hired by appellant to perform labor in a quartz mill. If respondent performed labor, which cannot be treated as labor on the said quartz mill, then the respondent has two distinct accounts, not one. The one hundred and ten days' labor were performed under an express contract for work on a quartz mill and its appurtenances. The balance of the work

was not on this quartz mill, or its appurtenances; and hence, was not performed under this contract. The company was liable for this labor on an implied contract. It is not contended that the original contract was ever varied or waived. The respondent treated the work done by the orders of the agent of the appellant, on his house, as work performed for the company. What issues were presented to the court below we do not know, as the pleadings in the cause are not made a part of the transcript. From the evidence set forth in the bill of exceptions, and from the brief filed by the appellant, this court is warranted in the inference that there was no issue presented to the court below upon the amount of indebtedness, but only as to the amount for which respondent was entitled to a lien upon the quartz mill. If there was such an issue presented, from the evidence set forth in the transcript, this court could not determine whether the court below had taken into consideration the amount of labor performed upon the building of the agent, in making up its findings of the amount of labor performed for appellant by respondent or not. Hence it will be seen there is not enough presented in the record to warrant us in interfering with the findings of the court below on this point.

The respondent, having two distinct accounts, could, at any time before he made out and filed his lien, as the appellant had not up to that time appropriated the payments made to respondent, appropriate them to the payment of either account. See *Haynes* v. *Waite*, 14 Cal. 446; *Field et al.* v. *Holland et al.*, 1 Am. Lead. Cas. 276.

We are inclined to hold that where a party performs labor for another in a case where he would be entitled to a lien for one part of his labor, and not for the balance, he may properly charge for his labor under two different accounts. And if the debtor, at the time of payment of any sum to the creditor, fails to make an appropriation to one or the other of the accounts, the creditor may do so at any time before he files his lien.

The respondent having appropriated the money paid to

him by appellant, first in payment for the labor not performed in the quartz mill, and then, as far as the balance would go, upon the labor on the said mill. And it appearing that the court below gave respondent judgment for $398.50 less than the value of the one hundred and ten days' labor performed in the said mill, we can find no error in the ruling of the court below.

The order and judgment of the court below is affirmed with costs.

Affirmed.

WARREN, C. J., concurred.

MARDEN, respondent, *v.* WHEELOCK et al., appellants.

PRACTICE—*issues of law—waiver of.* Issues of law should be disposed of before issues of fact are tried; but this right is waived by a party who goes to trial upon the facts, without insisting upon a demurrer, which has been filed in the action.

GARNISHEE—*when protected by stay of execution.* If an action is pending between M. and W., and W. is served with garnishment as the debtor of M. in an attachment suit subsequently commenced, the court should proceed with the first action to final judgment, and protect W., as garnishee, if necessary, by staying execution until the attachment suit is determined.

PRACTICE—*intermediate proceedings reviewed.* On an appeal from a judgment, this court can review the intermediate proceedings and afford relief.

PRACTICE—*oral instructions—not error.* It is not error for a judge of the district court to give oral instructions.

COSTS—*when presumed correct.* It is a presumption that the costs entered by the clerk, in a judgment, have been properly ascertained and taxed.

Appeal from the Third District, Lewis and Clarke County.

MARDEN commenced this action in May, 1867, against the defendants upon two promissory notes made by them to plaintiff. After the answer and replication had been filed, the defendants filed an "additional answer" on June 13, 1868, and alleged that G. W. Morse had commenced a suit against Marden on that day, and garnished the defendants as the debtors of Marden. They asked the court to stay proceedings in the action against them until the attach-

ment suit of Morse was disposed of. The court, MUNSON, J., denied the application, and proceeded to the trial of the cause upon June 15, 1868. A demurrer, which had been filed on July 12, 1867, by plaintiff to the original answer of the defendants, was never argued nor passed upon.

The jury returned a verdict for plaintiff for $3,250, upon which judgment was entered by the court.

The defendants filed the following objections to the instructions of the court: "Defendant's object to the instructions of the court upon the ground the same were not law, and that they were given orally."

The court overruled the defendants' motion for a new trial, and defendants appealed.

Before the argument of this cause on the appeal, respondent filed the affidavit of A. M. Woolfolk, stating that he was one of Marden's attorneys; that the suit of *Morse* v. *Marden* had been settled between the parties; and that the same so appeared upon the records of the court in Lewis and Clarke county

CHUMASERO & CHADWICK, for appellants.

No brief on file.

WOOLFOLK & TOOLE, for respondent.

The respondent had a right to abandon his demurrer and go to trial upon the truth of the facts of the defendants' answer. No exception was saved upon this point by appellant, as required by law.

Appellants do not show that they were injured by the ruling of the court below in refusing a continuance on account of the garnishment in the case of *Morse* v. *Marden*. Appellants saved no exception upon this point. Prac. act. 1867, § 188.

The affidavit of A. M. Woolfolk, on file, shows that the case of *Morse* v. *Marden* has been settled, and the garnishment is inoperative.

The bill of costs filed in the lower court is not embraced in the record. Appellants furnish no evidence to show that no bill of costs was filed. If there was error in this respect,

the remedy was by motion to retax the costs in the lower court.

WARREN, C. J. The transcript of the record filed in this cause does not show any statement, in compliance with the statute, to have been filed in the court below on the motion for a new trial, specifying the particulars in which the evidence is alleged to have been insufficient, or the particular errors in law alleged as occurring on the trial; no exceptions appear to have been taken and preserved in the record; and the appellants have not annexed any statement on appeal to this court. No order seems to have been entered upon the motion for a new trial, and the appeal is from the judgment entered on the verdict of the jury below, generally.

The appellants have filed in this court, for the first time, an assignment or specification of errors, which, as an appellate court, we must consider in the light of the record furnished us.

The first error alleged is in proceeding to trial of the cause without first disposing of respondent's demurrer to appellant's answer.

Under our practice a party may demur and answer or reply at the same time; and filing an answer or replication does not waive a demurrer previously filed, and issues of law should be disposed of before issues of fact are tried. A party, however, may unquestionably waive these rights, and does waive them by going to trial upon the facts without insisting upon his demurrer, especially if the opposite party does not call it up. The latter party is not injured in such case; and it is not for him to complain, upon appeal, as no injury has been or could be sustained by him in consequence.

The next error assigned is in the action of the court below in refusing to stay proceedings in this suit, until the determination of the attachment suit subsequently commenced and pending in the same court, in which the appellants were served with garnishment as debtors of respondent, in accord-

ance with the application for that purpose of appellants, filed as a supplemental answer in this cause.

This is a question of practice which, perhaps, is not fully settled.

It cannot be maintained that the garnishment of appellants, before answer and judgment against them, in any way affected the relations or rights of the parties to this suit, so far as the issues involved in it are concerned. All that the appellants could rightfully ask was that they be protected against double liability; and, in fact, their own application was that such action might be taken by the court, by continuance of this cause or otherwise, as would protect them. This protection could be afforded in one of two ways: either by suspending proceedings in this cause until the determination of the attachment suit against respondent, or by proceeding in this cause to final judgment, in the mean time protecting appellants as garnishees, and staying execution, if necessary, to await the result of the attachment.

We are of opinion that the latter is the proper and equitable course, and that the court below committed no error in refusing the continuance applied for. This suit was first commenced, and both were pending in the same court. The court could and should protect the appellants; and, so far as the record shows, did so. It does not appear that judgment was recovered in the attachment against respondent as defendant, or against appellants as garnishees, or that the attachment and garnishment remained pending at the time of rendition of the judgment in this cause. If such appeared to be the fact, and the court had failed to stay the execution under the judgment in this cause, the appellants would have sustained injury, and on appeal from the judgment, under our practice, this court could and would have reviewed the intermediate proceedings, and afforded appellants relief. Upon the record before us, appellants do not appear to have been injured by the action of the court in refusing to stay the proceedings, and, consequently, there is nothing to justify the interposition of this court.

As to the third error specified, all the record shows upon the subject is an "objection" of the appellants to the instructions of the court below, "upon the ground the same was not law, and that they were given orally." The instructions given are not preserved; the fact that they were given orally is no error; and the record does not show a request on the part of appellants that they should be reduced to writing by the court. A mere motion of a party filed in a cause, assuming that certain facts exist, cannot be regarded as a substitute for a bill of exceptions, or statement of facts agreed on by the parties, or certified by the court, as contemplated by our statute.

The clerk has entered the costs in the judgment rendered, and the presumption is that they were properly ascertained and taxed. The memorandum furnished by the party of his items of costs need not necessarily form part of the transcript on appeal.

The judgment of the court below is affirmed, with costs.

Affirmed.

KNOWLES, J., concurred.

COPE, respondent, *v.* UPPER MISSOURI MINING AND PROSPECTING CO., appellant.

ATTACHMENT — *dissolution of.* The defective statement of a cause of action in the pleadings is not a ground for dissolving the attachment.

ATTACHMENT — *affidavit.* An affidavit for an attachment, which sets forth that the amount is due "upon in part of both an express and implied contract," without specifying how much is due upon each contract, is sufficient; but this affidavit is not a model of pleading.

ATTACHMENT LAW REMEDIAL. The attachment law is a remedial statute and must be liberally construed.

Appeal from the First District, Madison County.

COPE commenced this action in February, 1868, to recover for services performed and goods sold and delivered. The complaint contained the following verification and affidavit of the respondent:

"George F. Cope, plaintiff in the above suit, makes oath and says, the facts as stated in the foregoing complaint have been read to him, and that he knows of his own knowledge they are as stated therein true. Affiant says, on his said oath aforesaid, that said defendant is indebted to the plaintiff in the sum of $4,253.30, over and above all legal set-offs and counter-claims upon (in part of both an express and implied contract), for the direct payment of money, and that such expressed and implied contract was made and are payable in this Territory, and that the payment of the same has not been secured by any mortgage, lien or pledge upon real or personal property; that the defendant is a non-resident of the Territory, and a foreign corporation; that the sum aforesaid set out in this affidavit, and for which the attachment is asked, is an actual *bona fide* existing debt, due and owing from said defendant to the plaintiff; and that this attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of said defendant."

An undertaking was filed by Cope, according to law, and the writ of attachment was then issued by the clerk of the court. The defendant appeared by its attorneys, and moved to dismiss the writ of attachment on account of the insufficiency of the affidavit. The court, WARREN, J., denied the motion, and defendant excepted.

W. F. SANDERS and H. N. BLAKE, for appellant.

The paper, termed the affidavit for the attachment, performs a double office, and also forms the verification of the respondent's complaint. The verification of a complaint, and the affidavit for an attachment, are regarded by the statutes as distinct and separate. Acts 1867, 156, § 121. affidavit for attachment; Acts 1867, 144, § 55, verification of complaint. The law does not regard with favor pleadings of a hybrid character, like those above specified. *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 334.

The affidavit should show the amount of the indebtedness upon a "contract, express or implied." It should show what is due under each contract. The respondent's affida-

vit states that the indebtedness is due in part upon both. Acts of 1867, 156, § 121; *Hawley* v. *Delmas*, 4 Cal. 195. Uncertainty in the affidavit will vitiate it. Drake on Attach., § 104. This statute must be construed strictly. ***Roberts*** v. *Landecker*, 9 Cal. 262.

DAVIS & THOROUGHMAN, for respondent.
No brief on file.

KNOWLES, J. This cause comes to this court on appeal from an order overruling a motion to dissolve an attachment proceeding.

The first point relied upon by the appellant in support of his motion is, that the attachment proceeding is void, for the reason that in the affidavit, upon which the attachment proceeding is founded, the facts necessary for the verification of the complaint are set forth. It is contended that this alone, notwithstanding there may be sufficient set forth in the affidavit to sustain the attachment writ, is such a defect that the court should have dissolved the whole proceeding. No attachment will be dissolved for surplusage in the affidavit. The facts verifying the complaint may properly be treated as surplusage, as far as the attachment proceeding is concerned. The fact that there may be no verification to the complaint, is not such a defect as to warrant the dissolving the attachment proceeding. If the action should be dismissed, upon proper motion, for this defect, of course, the attachment proceeding, being auxiliary, would fall with it. But, because the cause of action is improperly or defectively stated in the complaint is no ground for dissolving an attachment.

The second point relied upon by the appellant is, that this affidavit having been filed to perform the double purpose of a verification to a complaint and of an affidavit, is a pleading of a hybrid character, and not favored in law. And the case of *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 334, is cited to support this view. In that case a demurrer and answer were united in the same pleading, and it was not decided that, for this reason, there was neither demurrer

nor answer in the action; but the whole pleading was treated as an answer; and we hold that, in this case, we would not be justified in saying there is no affidavit for an attachment.

The third point presented by the appellant is, that the affidavit is fatally defective, because it is set forth therein that the defendant is indebted to the plaintiff in a certain amount, naming it, "upon, in part, of both an express and implied contract for the direct payment of money."

It is contended that the affidavit should state how much is due upon the express, and how much upon the implied contract. It would have been, no doubt, better practice to have stated how much was due on each contract. It is not necessary, however, for a party seeking an attachment to set out in his affidavit therefor his cause of action with any great particularity. It is sufficient, if the statute be substantially complied with. The case of *Hawley* v. *Delmas*, 4 Cal. 195, cited by the appellant, is not in point. That was a case where the grounds for the attachment were set forth in the affidavit, in the alternative. Alternative pleadings have ever been considered bad. In this case the grounds were stated conjunctively. Drake on Attachments, 104, cited by appellant to sustain the view that the attachment is void for uncertainty, because the cause of action is stated in the affidavit as above, is not authority in this case. The case there cited is one decided in the State of Louisiana, and based upon a statute which required the party seeking the attachment to state how much was due. The affidavit alleged that the defendant was indebted to the plaintiff in a certain amount, a part then due and a part to become due. The court held, very properly, that, as the statute required the applicant to state how much was due, and, as they could not tell this from the affidavit, it was fatally defective.

It will be seen by reference to that section of the attachment law, providing what must be set forth in the affidavit, to warrant the issuing the writ, that the second ground for attachment does not require that it should be set forth in

the affidavit whether the debt is due upon an express or implied contract or not. It is set forth in the affidavit that the defendant is a non-resident of the Territory. There is enough to warrant the issuing of the attachment under this head. The statute has been substantially complied with.

It is not true, as claimed by the appellant, that the attachment law should be strictly construed. Being a remedial statute, it should be liberally and beneficially expounded.

There were other points presented in the bill of exceptions, but, as they were not set forth in the brief of the appellant, they will be deemed waived.

In conclusion, we may be permitted to say, that, while we hold this affidavit to be sufficient to sustain the attachment writ, we do not regard it as a model.

It exhibits, on the part of the one who framed it, great carelessness, or a lamentable ignorance of the most common forms of judicial procedure.

The order of the court below is affirmed, with costs.

Affirmed.

WARREN, C. J., concurred.

BROWN, appellant, *v.* GASTON AND SIMPSON GOLD AND SILVER MINING COMPANY, respondent.

SUMMONS—*proof of service—affidavits.* The service of a summons should be proved by the return of the officer, or the written acknowledgment of the party served. It is improper practice to establish this fact by the affidavit of persons who were absent when the service was made.

PRACTICE—*default—how set aside.* A default can be set aside without showing excusable neglect, if the summons has been defectively served.

AGENT—*declaration of—authority.* The declaration of an agent of a corporation, respecting his authority, is hearsay testimony.

Appeal from the Third District, Lewis and Clarke County.

BROWN commenced this action in December, 1867, for services in erecting a quartz mill for defendant, and to enforce his lien as a mechanic therefor. The sheriff served

the summons upon Rodman Carter and made his return, which is stated in the opinion of the court. The clerk of the district court entered the default of the defendant, and a judgment in favor of the plaintiff, and made a minute of these proceedings in the "minute book" of the court, which was approved and signed by MUNSON, J. On January 11, 1868, the defendant, by its attorney, moved to set aside the default and vacate the judgment. On January 30, 1868, the court, MUNSON, J., made the following order upon this motion:

"In this case I am satisfied the judgment is bad, and cannot be held upon the pleadings and papers on file in the case. After argument counsel for plaintiff asks leave to file affidavits to cure defects and show that R. Carter, upon whom service was attempted to be made, was the acting agent of said company, with power to accept service. The plaintiff has leave to file said affidavits, and defendants have like leave to file counter affidavits. Said cause is continued one week for such purpose, with stay of proceedings on said judgment for such time and until further order of this court in the premises."

The plaintiff afterward filed the affidavits of Burdick, King and Cowan, and defendant filed none. Upon reading these affidavits, the court, MUNSON, J., on February 7, 1868, made an order as follows:

"On reading and filing affidavits on behalf of plaintiff herein, under the order of this court of January 30, 1868, and the certificate of the clerk that no affidavits have been filed by the defendants under said order, and the time allowed in said order for filing affidavits herein having expired. Now, on motion of Williams & Burdick, said motion is overruled, and said judgment heretofore entered in the above action stands as the judgment of this court as rendered."

On February 11, 1868, the court, MUNSON, J., made the following order in this cause:

"The January term of this court having, on the 4th day of February, adjourned for the term, and all causes and

motions not specially disposed of having been continued till the March term of said court, the order at chambers on the 7th inst. being premature and out of time, the same is hereby revoked and set aside, and said causes and motions therein are continued till said March term of said court for final order in the premises."

On March 6, 1868, the court, MUNSON, J., made the following order on the motion of defendant to open the default, and set aside the judgment for defective service:

"I think the affidavits in the above-named cause, although they do not show all that has been required in similar cases in some States to be good service, yet I will hold them sufficient for that purpose, and let the parties have the benefit of the ruling. Motion allowed, default opened and judgment set aside, with leave to defendants to move to file answer on or before Monday, March 9, 1868."

The answer of the defendant was filed on March 7, 1868, and alleged that defendant, on February 6, 1868, was adjudged a bankrupt in the district court of the United States, for the eastern district of Pennsylvania, under the provisions of the act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

The plaintiff appealed from the order of the court, dated March 6, 1868.

This cause, and that of Lamb against the same defendant, reported on page 64, were argued together.

SHOBER & LOWRY and H. N. BLAKE, for appellants.

WILLIAMS & BURDICK filed a written argument.

The court had no power to make the order of March 6, 1868, setting aside the judgment, which the court declared by the order itself to be regular in every respect, unless upon the defendants filing an affidavit of merits. *Quinn* v. *Case*, 2 Hilton, 467; *Excise Commissioners* v. *Hollister*, id. 588; *Ellis* v. *Jones*, 6 How. Pr. 296; Acts Montana, 1867, 147, § 71; *Macomber* v. *Mayor*, 17 Abb. 37. In addition to an affidavit of merits, defendants should show that

the omission to answer was the result of accident or mistake, without culpable negligence.

The only answer of defendants, the plea of bankruptcy, adjudged in a foreign court, after the entry of this judgment and the filing of defendants' motion to set the same aside, is evidence of the fact that defendants had no defense upon the merits. Courts will never open a regular judgment to allow an inequitable defense, *e. g.*, the statute of limitations, usury, infancy, coverture, etc. Bankruptcy is of the same nature as a defense. Bankrupt act, 1867, § 14; *Allen* v. *Ackley*, 4 How. Pr. 5; *Hawes* v. *Hoyt*, 11 id. 454; *Toole* v. *Cook*, 16 id. 142.

The orders made in this case, previous to the final order, were discretionary with the court, and not subject to review. *Lord* v. *Vandenburgh*, 15 How. Pr. 363.

The proof of the relation of Carter to the defendant is ample and sufficient in law. *Brevoort* v. *Mich. C. R. R. Co.*, 5 How. Pr. 183; *Bain* v. *Globe Ins. Co.*, 9 id. 448. In cases where there is a doubt, whether the party served is a managing agent, the burden is on the defendant to show that he was not a managing agent. 2 E. D. Smith, 519.

The defendant pleads no surprise or mistake, and offers no excuse for neglect. The court having held the service sufficient, it was an abuse of discretion to open the default. *Bailey* v. *Taafe*, 29 Cal. 422.

CHUMASERO & CHADWICK, for respondent.

The return of the officer does not show that the summons was served on the defendant, or any one authorized to accept service. (This suit was brought before the passage of the California Practice Act of December 23, 1867.) Acts 1865, 48, §§ 29–34.

The clerk had no power to enter judgment by default. This was an action to foreclose a mechanic's lien, and required a special decree and judgment for the relief prayed in the complaint, and a special order for the sale of the property. Acts 1867, 162, § 150; Mechanic's Lien Law, Acts 1865, 336, § 18. There was only a waiver of the service of

the summons, and an indorsement on the complaint of the appearance of Carter, as attorney in fact, not as attorney at law. There was no proof by affidavit of such acknowledgment as is required by Acts 1865, 50, sec. 34. *Alderson* v. *Bell*, 9 Cal. 320; Acts 1867, 140, § 29.

In order to render judgment or other judicial proceedings valid, it is indispensable that the court have jurisdiction of the person, subject-matter and process. Unless process be executed as the law requires, the court acquires no jurisdiction. *Reynolds* v. *Orvis*, 7 Cow. 269; *Gallatain* v. *Cunningham*, 8 id. 361. In case of want of jurisdiction over the person or subject-matter, the judgment is a nullity. *Horton* v. *Auchmoody*, 7 Wend. 200; *Norman* v. *Wells*, 17 id. 145; *People* v. *Rensselaer & Saratoga R. R. Co.*, 15 id. 121; 1 Scam. 488; 3 id. 107.

In case of void judgment, no affidavit of merits is required.

KNOWLES, J. This was an action against the above-named respondents, a corporation organized under the laws of the State of Pennsylvania to carry on the business of mining in this Territory, to foreclose a mechanic's lien.

The sheriff who served the summons made the following return of service thereof:

"I served the within summons by reading the same to Rodman Carter, and delivering to him a copy thereof; also delivered to him a copy of complaint. All done in Edgerton county, M. T., December 9, 1867."

On the 7th day of January, 1868, the appellant claimed of the clerk of the district court a default against the respondent, which was duly entered. On the same day, at the request of appellant, the clerk entered up a judgment against respondent for the amount claimed in the complaint, and an order of sale of the described premises. The defendant, within two days thereafter, filed his motion to have the judgment vacated and the default set aside, for the reason, among others, that the service of summons was defective.

The court held, on the hearing of this motion that the

proceedings were defective, but gave the appellant one week in which to file affidavits, showing that Rodman Carter was a general managing agent of the said corporation, the respondent. Affidavits were filed, which the court held were sufficient, and it was ordered that the judgment should stand as the judgment of the court. On the 11th day of February the judge reversed this order, on the ground that it was made out of term time, and that on the adjournment of the court all causes and motions had been continued for the term. On the 6th day of March following the court rendered a decision, holding the service good, but, at the same time, setting aside the judgment and default, and giving the respondent time to file his answer.

From this order the appellants appeal to this court.

If there was a good service of summons upon respondent, and a default had been regularly entered, and a judgment thereon, there is no doubt that it was improper practice to allow the respondent, without any showing of excusable neglect or inadvertence, to have the judgment vacated and the default set aside, and leave to file an answer to the complaint. Does the record present such a case? No matter what the reasons which induced the court to sustain the motion may have been, still, if there were legal grounds presented to him which warranted his ruling, it is the duty of this court to sustain it.

It is not contended that the return of the sheriff shows sufficient service of summons to warrant the judgment. The appellant, however, sought to remedy this defect, by filing affidavits of third persons to show that Carter was a managing agent. When an officer serves a summons the usual way, and we are inclined to say the only way of proving that service is either by the return of the officer himself or the written acknowledgment of the party served. The attempt to amend service of summons by the affidavits of persons who did not make the service, is certainly doubtful practice, but when these parties do not pretend to have been present when service was made, or to know that the sheriff did make service on the particular individual described, we

are sure it is improper practice. Not one of the persons making affidavits pretend to know that the Carter they are deposing concerning is the one upon whom the sheriff made service. There is another point connected with these affidavits which strikes us forcibly. One sets forth what Carter told him was the position in the company which he held, which is certainly hearsay testimony. Another deposes concerning the contents of a written power of attorney which he says Carter told him was sent him by telegraph. It is well, perhaps, he does not depose concerning the signatures to this power of attorney. The third affidavit sets forth certain transactions in which Carter was engaged as the agent of the company. This, however, so far as it is not hearsay, does not show that his agency pertained to all the affairs of the company. If it did not, it has been held that he was not what is denominated a general managing agent, and service upon him would not have been sufficient. Such affidavits, we are of the opinion, are insufficient to amend a return of a sheriff of service of summons if such practice be proper.

Where the service of a summons is defective, it is not error for the court to sustain a motion to vacate a judgment and set aside a default, and allow the defendant to make answer to the merits of the complaint.

In accordance with these views the order of the court below is affirmed, and the cause remanded for further proceedings.

Affirmed.

WARREN, C. J., concurred.

LAMB, appellant, *v.* GASTON AND SIMPSON GOLD AND SILVER MINING COMPANY, respondent.

ATTORNEY IN FACT — *authority for appearance.* The attorney in fact of a corporation, who is not its general managing agent, cannot appear in an action against it without special authority.

PRACTICE — *default — how set aside.* A default should not be set aside, if the service has been regular, without affidavits of excusable neglect or inadvertence, and also of merits.

CASE AFFIRMED. The case of *Brown* v. *Gaston and Simpson Gold and Silver Mining Company*, *ante*, p. 57, affirmed.

Appeal from the Third District, Lewis and Clarke County.

THE facts in this case are substantially the same as those in the case of *Brown* v. *Gaston and Simpson Gold and Silver Mining Company*, *ante*, p. 57. The pleadings, motions and orders of the court, MUNSON, J., are the same.

This case was argued at the same time with that of Brown against same defendant, and the arguments are given in the report of that case.

SHOBER & LOWRY and H. N. BLAKE, for appellant.

WILLIAMS & BURDICK filed a written argument.

CHUMASERO & CHADWICK, for respondent.

KNOWLES, J. The facts presented in this case are in the main the same as those of *Brown* v. *Gaston and Simpson Gold and Silver Mining Company*. The only difference is the manner in which the respondent was brought into court. In this case R. Carter, who, it is claimed, was the managing agent of the respondent, a mining corporation, made a memorandum on the complaint, which it is claimed was a waiver of service of summons, in the following words:

"I hereby waive service of summons in this action, and hereby appear as attorney in fact of said company.

"HELENA, *Nov.* 25, 1867.

"R. CARTER."

The affidavits and brief filed in this case, and the proceedings subsequent to the signing of this memoranda, are the

same as in the aforesaid case of Brown against this respondent. The court below, it would appear, held that this appearance was insufficient, unless it appeared that Carter had authority to appear in this cause for respondent. To establish this fact the appellants filed affidavits to show that he was a general managing agent of the respondent.

The affidavit of Burdick establishes the fact of the genuineness of Carter's signature to the memoranda. But as far as the authority of Carter to appear in the cause is concerned, he only recites what Carter told him. While the evidence of Carter would be sufficient to establish his agency, what he said is incompetent. It is hearsay testimony. The affidavit of Cowan is mostly hearsay testimony. So for as it is not, it shows only that Carter acted for the company in settling his account. This would not be sufficient to warrant him in appearing in an action.

The affidavit of King recites that he had seen a power of attorney to Carter from respondent, which had been sent him by telegraph. Waiving all objections to the proving of a power of attorney sent by telegraph, he does not state that there was in this any express power to appear in an action against the respondent or any one else. Nor does it show that he was a general managing agent. Carter himself does not, in the memoranda he signed, describe himself as a managing agent, but only as an attorney in fact. An attorney in fact, unless he has express authority to appear in an action, cannot do so. The authority for an attorney in fact to appear in a suit must appear within the term of the grant of power to him, unless he is a general managing agent of a corporation, and then perhaps it would be presumed. The managing agent of a corporation, however, to have this authority, must be one whose powers extend to the whole business of the company, and upon whom service of summons could be made in accordance with the provisions of the statute. Believing that there is not sufficient evidence to establish the fact that Carter was a general managing agent of the Gaston and Simpson Gold and Silver Mining Company; and waiving all objections to the power of attorney

which he received by telegraph, it not appearing that he had express authority to appear in suits against the respondent, we find no error in the ruling of the court below. However, if we believe that the affidavits filed did establish these facts, as the court below seems to, we would hold it improper practice to allow the respondent to have the default set aside, and be permitted to come in and answer without an affidavit of excusable neglect or inadvertence and merits.

We hold, as in the case of *Brown* v. *Gaston and Simpson Gold and Silver Mining Company*, that in a cause where the manner in which a defendant is brought into court is defective, it is not error to allow him to come in and answer without any affidavit of excusable neglect or inadvertence and merits.

In accordance with these views the order of the court below is affirmed, and the cause remanded for further proceedings.

Affirmed.

WARREN, C. J., concurred.

GRIFFITH et al., respondents, *v.* HERSHFIELD et al., appellants.

STAMPS ON GOLD DUST CONTRACTS. A writing stating that a certain quantity of gold dust is due, without specifying its value, and a mortgage executed to secure the delivery of the same, are not "instruments for the payment of money," under the act of congress requiring stamps to be affixed to them.

COUNTY RECORDER—*authority*—*stamps*. A county recorder is not authorized to determine the value of gold dust described in a mortgage which is presented to him for record, and cannot know what stamp should be affixed thereto before he records it.

STAMPS ON MORTGAGE AND NOTE. It is legal to affix stamps to a note, or the mortgage executed to secure its payment, or both, if the amount on both is sufficient.

PRACTICE—*judgment on reserved verdict*. It is not error to enter judgment upon a verdict which has been reserved for consideration, on the motion of complaining party.

INTEREST ON JUDGMENTS. Judgments bear interest in this Territory at the rate of ten per centum per annum.

Appeal from the Third District, Lewis and Clarke County.

GRIFFITH and Thompson commenced this action to foreclose a mortgage executed by Hermann & Star, to secure the payment of a number of ounces of gold dust. The suit was brought in the district court in Jefferson county, on June 18, 1867, which was then attached to Edgerton county for judicial purposes. The name of Edgerton county was changed to Lewis and Clarke county by an act of the legislature, approved December 20, 1867. Hermann & Star made the following instrument, which formed a part of the complaint:

"VIRGINIA CITY, M. T., *October* 17, 1866.

Due Griffith & Thompson, or order, for balance due for building quartz mill as per settlement this date, the amount of ninety-three and one-half ounces (93½ oz.) in good merchantable gold dust, and the amount of four and two-thirds ounces (4⅔ oz.) per month additional, in merchantable gold dust, from date until paid.

HERMANN & STAR."

{$1 U. S. Rev. Stamp, canceled.}

On the same date Hermann & Star executed a mortgage on their quartz mill, to secure the payment of the gold dust contract. The mill was situated in Jefferson county. The mortgage was acknowledged in Madison county on November 8, 1866, before a notary public, and filed for record with the county recorder of Jefferson county on November 10, 1866. The mortgage was stamped with an internal revenue stamp of the United States of the value of two dollars.

Hermann & Star answered on July 1, 1867, and Hershfield and Hanauer, on the same day, filed their petition to intervene in the action, and stated the following facts: That Hermann & Star, on November 8, 1866, executed to Hershfield and Hanauer a deed to the property described in the mortgage to Griffith and Thompson; that this deed was recorded in the county recorder's office in Jefferson county, on November 14, 1866; and that it was executed for a valuable consideration, to secure the payment of money due

from Hermann & Star to Hershfield and Hanauer. They prayed to be made parties to the action, to contest the claim of Griffith and Thompson; that their deed be declared a prior incumbrance to the plaintiffs' mortgage, and that the property be sold to satisfy their demand against Hermann & Star, being $16,940 and interest.

The plaintiffs filed their answer to the petition of the intervenors, and the cause was tried in April, 1868, in the district court, MUNSON, J. On the trial the intervenors objected to the introduction of the mortgage from Hermann & Star to the plaintiffs, and also a certified copy of the same, which plaintiffs offered in evidence, on the ground that the mortgage was not legally stamped, and that the evidence that it had been recorded was insufficient. The objection was overruled, and the intervenors excepted.

The jury returned a general verdict for the plaintiffs, and, among other special findings, that the value of the gold dust, mentioned in the instrument dated October 17, 1866, was $2,103.75.

On motion of the counsel for the intervenors, the entry of judgment upon the verdict and findings of the jury was stayed, until they could be heard thereon. After the argument of counsel the court rendered its decree in favor of plaintiffs, on May 18, 1868, and the intervenors appealed. The amount of the judgment was $3,993.75, with interest thereon from May 18, 1868, at the rate of two and one-half per cent per month.

CHUMASERO & CHADWICK, for appellants.

The mortgage should have been excluded, because it was not sufficiently stamped. The complaint showed that the gold dust was of the value of $2,770.60. The mortgage should have had upon it a stamp of $3. It actually had a stamp of only $2. Int. Rev. Laws and Regulations, Series 3, No. 10, May 10, 1867, p. 12.

The mortgage was not made until the day before its execution, on November 8, 1866, although it has the same date as the note. The note was not sufficiently stamped at the

time it was made. The law does not allow the stamps to be divided; one of the instruments must be sufficiently stamped. If such a division is allowed, it can only be done when the instruments were executed simultaneously. A party must apply to the collector to stamp instruments insufficiently stamped. Int. Rev. Laws 1867, § 158. No rights acquired prior to such re-stamping can be affected thereby. The mortgage, executed twenty-two days after the note was given, ought to have had the full amount of the stamp upon it. The mortgage could not be connected with the note, so as to avoid the consequences of the insufficient stamping. A stamp once canceled cannot be used to give vitality to an instrument subsequently executed.

The amount secured was uncertain; but the complaint and testimony show that the parties to the instrument well knew the amount intended to be secured, $2,770.60. The jury found the value of the gold dust to be $2,103.75. The plaintiffs knew that the amount so secured was over $2,000, and this value never decreased.

The mortgage was not entitled to be recorded. The mortgage was not properly stamped, and did not show that the proper amount had been affixed to any instrument. Such an instrument could not be recorded under the Internal Revenue Law, §§ 152 and 163. The mortgage, if afterward stamped, could not affect prior rights. Id., § 158. The record was absolutely void, and could not be used in evidence.

The recorder had no right to record the mortgage. An instrument placed on record, without authority of law, cannot be treated as notice to subsequent purchasers or incumbrancers.

The court erred in allowing interest upon the judgment at the rate of two and one-half per cent per month. The law fixes the rate of interest on judgments at ten per cent per annum. Acts 1865, 535, § 2. A judgment carries such rate of interest as is legal at the date of the judgment, regardless of the rate recoverable on the contract. *Verner*

v. *Hughes*, 6 Halst. 91; *Byrd* v. *Gosquet*, 1 Hemp. 261; *Evans* v. *White*, id. 296.

The decree is void. It was made in vacation, and should have been made before the close of the term at which the case was tried. The court had no right to order the judgment to be entered in vacation. *Hogeboom* v. *Genet*, 6 Johns. 325; *Sheppard* v. *Wilson*, 1 Morris, 448; *Goddard* v. *Coffin*, Davies, 381.

There was no order of the court, after the trial, reserving the cause for further consideration. The clerk should have made an entry of such order. Nothing of this kind was done. Acts 1867, 167, § 178.

WORD & SPRATT and WOOLFOLK & TOOLE, for respondents.

The jury find that respondents' mortgage was first recorded in the proper county. It is, therefore, entitled to precedence over that of the intervenors. Acts 1865, 484, §§ 24 and 25; 4 Kent's Com. 191; 4 Abb. Dig. 687, §§ 23, 75, 688. Each mortgage was executed and received without notice of the other.

The intervenors' mortgage was executed and recorded as an absolute deed. It does not operate as constructive notice of a mortgage, and is regarded as an unrecorded mortgage. 4 Abb. Dig. 686, § 1; 688, §§ 31, 32, 33; *James* v. *Morey*, 2 Cow. 246; *Dey* v. *Dunham*, 2 Johns. Ch. 190.

Respondents' mortgage was made and executed to secure a certain amount of gold dust. The revenue laws apply only to mortgages securing a certain sum of money, while this mortgage was to secure an indefinite amount of gold dust as to value. The note and mortgage were both stamped, and, in law, they are regarded as one instrument. The stamps, amounting to $3, were more than sufficient to cover the value of the gold dust as found by the jury. U. S. Int. Rev. Laws; decision of Commissioner Rollins of September 4, 1868.

The records, which are the best and only evidence, show that there was no adjournment of the term at which the

decree was rendered. 1 Greenl. Ev., § 513. If the decree was signed in vacation, the findings of the jury were in court and during the term, and it is the duty of the supreme court to enter such judgment on the findings of the jury as is right. *Love* v. *Shartzer*, 31 Cal. 488.

WARREN, C. J. The chief question raised upon this record is the sufficiency of the revenue stamps affixed to the instruments executed to appellees by Hermann & Star, defendants below. The internal revenue act, in force at the time they were executed, imposed an *ad valorem* duty upon specified instruments in writing for payment of money, or upon "other written or printed evidence of an amount of money to be paid on demand, or at a time designated;" and, also, upon mortgages of real or personal property made as security for the payment of any "definite and certain sum of money." It also provides that it shall not be lawful to record any instrument required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed, and that such record, if made, shall be void, and shall not be used as evidence.

The instrument in question in this case is not for the payment of money. It is "evidence" of an agreement to pay appellees a certain number of ounces of gold dust, on demand, and the mortgage was executed to secure the same. The former instrument was stamped to the amount of $1, and the latter to the amount of $2. The appellants contend that they were insufficiently stamped, and that the record of the mortgage, though made prior to that of the conveyance or mortgage to them, was void, and that they were not thereby legally charged with notice of its existence. It is assigned that the court erred in admitting the instruments, and the certificate of record of the mortgage, in evidence upon the trial below.

We are of opinion that the instruments in question are not embraced in the schedule embodied in the revenue act, as subject to the *ad valorem* duties thereby imposed upon similar instruments for the payment and securing of money,

and that they were valid, and that proof of the record of the mortgage was properly admitted. The contract or agreement of the parties was for the payment or delivery of certain property; and the mortgage was executed to secure the performance of the agreement, and they cannot be regarded as being for the payment of money.

Had the money value of the gold dust been expressed in the instrument, or could it have been ascertained from its terms, the case would have been different.

It was the duty of the recorder, under the territorial law, to record the mortgage, and the record, when made, was notice to all. Under the act of congress he had no legal authority to determine the value of the property embraced in the mortgage, and the payment of which it was made to secure; and no means were furnished him by which to arrive at the amount of duty to which the instrument was subject. Had congress designed to include such instruments in the provision relating to recording, power would have been conferred to ascertain by some means the value, in order to determine whether the amount of *ad valorem* duty paid, as denoted by the stamps, entitled it to record or not.

Admitting, however, that while the instrument secured by the mortgage was only subject to duty as an agreement or contract, the mortgage was subject to the *ad valorem* duty, the amount to which it was subject would depend upon the value of the property secured by it at the time of the execution of the mortgage, and not upon its subsequent value, or with the accrued interest.

The agreement, or memorandum, and the mortgage, both bear date October 17, 1866, and, in their special finding, the jury found that to be the true date. There is no proof, and no presumption of law, that the value of the gold dust, at that time, exceeded the amount indicated by the stamps.

If, however, as claimed by appellants, the mortgage was not executed until November 8, 1866, still the value of the gold at that time, as found by the jury, was $2,103.75, and the two instruments constituting but one transaction, the amount of duty upon them denoted by the stamps was

sufficient. The object of the act is to derive revenue; and the amount of the stamps being sufficient, it is not material to which they were affixed. The record shows that after rendition of the verdict, the court, on appellants' motion, ordered the case to be reserved for further consideration; and, after argument, entered judgment in conformity to the verdict. In this there was no error.

The court below erred in allowing interest upon the judgment at a greater rate than ten per cent per annum; and the judgment is hereby modified so as to conform to this opinion, and affirmed as modified.

Modified.

KNOWLES, J., concurred.

This judgment was reversed at the August term, 1872.

CONNER, appellants, *v.* MCPHEE, respondent.

PRACTICE—*nonsuit—plaintiff's motion to set aside.* A plaintiff can move to set aside a nonsuit, which has been entered with his consent, after it was evident that he could not recover on account of alleged error in the rulings of the court.

QUARTZ-CLAIM—*record—number of feet.* The record of a quartz-claim, which does not specify the number of feet claimed by the pre-emptor, is admissible in evidence in this case. The number of feet need not be specified in the record of the claim.

PRACTICE—*review—matters not in record.* This court cannot review matters which are not presented in the record of the case.

Appeal from the First District, Madison County.

THIS action was commenced by Conner and O'Neal in September, 1865, in the district court. The complaint alleged that Conner, in April, 1864, located and staked claim numbered one, south-west from the discovery claim on the Ore Cache quartz lode in Summit district, Madison county; that it comprised one hundred and twenty-five feet; that twenty-five feet was recorded by mistake as a

part of the discovery claim by James Miniss, who conveyed the same to Conner by deed recorded May 10, 1864; that Conner, on October 19, 1864, conveyed to O'Neal by deed one undivided half of said one hundred and twenty-five feet; that Conner and O'Neal had peaceable possession of this property until November 9, 1864, and performed thereon the work required by law; that defendant, McPhee, wrongfully entered upon the same on November 9, 1864, and filed a pre-emption claim to one hundred feet of it; and that McPhee was mining the ground.

The defendant answered on December 4, 1865, and denied the material allegations of the complaint. He also set forth that claim numbered one, south-west from discovery claim on the Ore Cache lode, was located, pre-empted and recorded as only one hundred feet in length; that Conner pretended to pre-empt this claim, but did not stake it and comply with the law in other respects; that said claim was never worked and was vacant until McPhee located and pre-empted it on November 9, 1864; and that defendant worked and possessed said claim until August 17, 1865, when he was restrained by an order of court.

The plaintiffs filed their replication and denied the new matter contained in the answer.

The cause was tried in September, 1867, in the district court, HOSMER, J., to whose rulings upon the admission of certain evidence the plaintiffs excepted, and consented to the entry of a nonsuit. The plaintiffs then moved to set aside the nonsuit and for a new trial on account of the erroneous rulings of the court. This motion was denied and judgment then rendered against plaintiffs, who appealed.

The evidence referred to, which was contained in the exception considered by the court, appears in the opinion The other exceptions that were taken upon the trial were not passed upon and are not embodied in the report of the case.

WORD & SPRATT and DAVIS & THOROUGHMAN, for appellants.

The court erred in refusing to submit to the jury the issues framed by appellants relating to the circumstances under which the appellants and respondent acquired the rights they claimed. Parol evidence is always admissible to prove such facts. *Stanley* v. *Green*, 12 Cal. 162. The court also erred in submitting to the jury issues of law.

The first issue submitted to the jury was "the number of feet contained in claim number one, south-west from discovery." After submitting the same as a question of fact, the court refused to allow appellants to introduce any testimony showing the number of feet staked and contained in said claim, because the law fixed the number of feet. If it was a question of law, the court erred in submitting it to the jury. Parol evidence is competent to prove the number of feet in the claim in controversy. 1 Greenl. Ev., §§ 288 and 301.

The court erred in refusing to allow appellants to prove the staking of the claim. 1 Greenl. Ev., § 94; Idaho Stats. 577. The court erred in refusing to allow appellants to prove that they had done the $100 worth of work on the claim within six months after it was recorded. This issue was submitted to the jury, and the court then rejected the testimony of appellants tending to prove that fact.

The court erred in refusing to allow appellants to prove the written notices placed upon the stakes, and that they were plainly to be seen at the time respondent took possession of the claim. The record shows that the claim was recorded on May 10, 1864. The answer shows that respondent took possession of the same on November 9, 1864, within less than six months from the time it was recorded. Under the laws of Idaho Territory, then in force, appellants had the whole six months to put on the claim the amount of work required by the statute. The time thus allowed did not expire until on or after November 10, 1864. The possession by respondents, before the expiration of the six months, forcibly as alleged, is a sufficient excuse for the failure of appellants to

perform the work required, if there was any such failure. Respondent is estopped in law from setting up any alleged failure as a defense.

The court refused to allow appellants to show that they had complied with the statute and thereby forced them to submit to a nonsuit. An appeal will lie from a nonsuit taken under the circumstances of this case. *Natoma W. & M. Co.* v. *Clarkin*, 14 Cal. 549; *Sweet* v. *Lee*, 42 Eng. C. L. 240.

W. F. SANDERS and W. M. STAFFORD, for respondent.

No error lies from a voluntary nonsuit. *Imley* v. *Beard*, 6 Cal. 666, and cases cited; Hilliard on New Trials, 74 and 497.

The court below excluded nothing, but assumed to direct the order of appellants' proof. There was no error in this. The fact first required by the court was the fact on which appellants' claim hinged. A certain paper had been placed on the district records, where this claim was situate, by which Conner meant to pre-empt one hundred feet. The appellants then wanted to show that a copy of this same paper was recorded in Madison county records, and Conner then meant something else, *i. e.*, two hundred feet. In other words, this paper got up to secure one hundred feet to Conner — not by reason of any change in it, but by reason of change in his mind — secured something else, and more. Conner claims that he was misled into recording the discovery claim as a discovery claim. The discovery claim "was to be, and was, one hundred feet in length," according to the complaint. Claim number one south-west was also to be, and was one hundred feet in length, according to the complaint, location, agreement of Conner and Miniss, and the record. The south-west twenty-five feet of discovery, recorded in the name of Miniss by mistake, according to Conner, was deeded to Conner. Appellants wish to abandon these facts, and substitute therefor intentions and hopes, and brush away records, customs and rights.

It is difficult to tell whether this is an action of ejectment, or an equitable proceeding to quiet title. It is both.

Appellants' motion for a change of venue was properly denied. This is a question which is addressed to the discretion of the court. In this case the parties were attempting to escape the conviction of the court, on a question of law. The judge who tried the cause gave the appellants a fair bill of exceptions, which is all they could demand.

In chancery causes the refusal of the court to submit issues to the jury is no ground for error. Acts 1865, 73, § 154. Appellants' issues were wrongly framed. The chancellor could have tried the cause without any jury, and the rights of appellants were not affected by submitting to the jury material or immaterial issues.

The court properly required appellants to lay a foundation for their oral proof by written muniments of title. Without this foundation the oral proof was incompetent. Appellants proved, by the record, that they owned claim number one south-west, and also twenty-five feet of discovery. Their record of this fact was notice to all parties that might be affected thereby. Appellants asked to prove that their record was false by showing that the record claim number one south-west, and twenty-five feet of discovery, was claim number one south-west, and nothing else. The court held appellants to introduce record proof which their verbal testimony would fit, not contradict. They refused to do this, and voluntarily dismissed their case, and then moved the court to set aside their deliberate acts. They should have submitted their case to the jury on their proof. How can this court say what the verdict would have been, or that appellants were injured at all.

The record was the best evidence. Appellants claim it was not true, and that parol evidence is the best. Titles do not rest on such flimsy foundations. The order in which evidence may be introduced is a matter of discretion. Unless there has been a gross abuse of this discretion by the court below, the proceedings will not be revised. Hilliard on New Trials, 300, 307, 331, and § 573.

The real question in this case is, whether the court was right in deciding that a proper record, justifying the hold-

ing of twenty-five feet of discovery, and claim number one south-west, of one hundred feet, *as one claim*, was necessary in the case. Conner wished to swear it was in his mind all only one claim. Appellants wished to hold claim number one, by proving that they had performed work upon twenty-five feet of discovery, which they desired to attach to number one. The court stopped them, until they could show a record in harmony with their proof.

We do not claim that a person cannot locate less than two hundred feet as a claim. That which the records show a claim, cannot be changed in length or locality by any thing less than a re-location shown on the record. It was not decided, nor claimed in the court below, that the number of feet must appear in the record. It is clear that these may be omitted. But if one is going to re-baptize two claims, he must do so by record. No one can, by any mental action, take up the dividing line between a discovery claim and claim number one, and move it twenty-five feet over on the discovery claim, and thereby make it the dividing line. A record is the one essential thing to change a line.

KNOWLES, J. The first question presented in this case is one of practice. Can the plaintiffs in an action move to set aside a nonsuit when they have consented to it, upon its becoming apparent, from the rulings of the court, that they could not recover, basing their motion upon alleged error in the rulings of the court, which induced them to consent to the nonsuit?

Such practice we hold proper. See *Natoma Water and Mining Co.* v. *Clarkin*, 14 Cal. 544. A nonsuit in such cases is treated as and governed by the same rules as an involuntary nonsuit.

The only ground of error assigned which we deem it material to examine, is the exclusion of the evidence offered by the appellants.

They offered in evidence the records of Madison county, showing the record of Conner's location of the ground in

dispute; a deed from Miniss to Conner of twenty-five feet of the ground in dispute; a deed from Conner to O'Neal of one-half of the ground in dispute; and, lastly, they offered to prove by the testimony of Conner the number of feet staked off by him for the claim number one, south-west from discovery on the Ore Cache lode, the size of the stakes, the notice written on them, and the amount of labor performed on said claims within six months after the location of the same. The record of location offered did not specify the number of feet claimed. The court refused to allow the appellants to prove these facts, until they should first lay the foundation therefor, by proving "that the claim in controversy was pre-empted, and appears on the record in due form as embracing the number of feet claimed for it by plaintiffs." This is the exact language of the bill of exceptions, and would imply that the court held that the record of the location of a quartz claim should specify the number of feet claimed, and that the appellants, in this case, should first introduce such a record before they could introduce other evidence. This we hold error. The language of the Idaho statute, in relation to the location and recording of quartz claims in force at the time of the location and recording of the claim in dispute by appellants, is as follows:

"All claims shall be recorded in the county recorder's office within ten days from the time of posting notices thereon."

What record must a locator of a quartz claim make to satisfy this law? Courts generally give to such a statute the interpretation usually accorded to it by the people who use the terms therein employed. Recording a claim is a phrase used among the locators of mining claims. It is a law maxim of general application that contemporaneous exposition of a statute has great strength in controlling its interpretation. By examining the records of quartz claims in the several counties of this Territory, which were once a part of Idaho, and the records of quartz claims of the several counties of Idaho, at the time this law came into force, and we will arrive at some conclusion as to what was generally

understood by the locators of quartz claims at that time, was a compliance with the law requiring the recording of quartz mining claims. An examination of these records, we are confident, will show that it was not generally considered necessary to state in the record the number of feet claimed. This seems to be conceded by the attorneys for both parties. And it is contended by the attorneys for the respondent that the court did not rule that a record should show the number of feet claimed. If such was the case, we do not understand the bill of exceptions signed by the judge who tried the cause, or why the record of appellants' location was excluded. If the court had no objecions to Conner's testimony, and only directed that there should be first introduced the record of his location of the claim in dispute, and did not hold that this record should specify the number of feet claimed, the very record demanded had already been offered in evidence, and one of the objects of Conner's testimony was to establish the number of feet in claim number one, south-west from discovery in the Ore Cache lode, at the time this record was made. If the ruling of the court is not as we understand it, then the language used in the bill of exceptions, signed by the judge who made the ruling, is very unfortunate.

We have been led to infer, however, from the arguments of counsel on both sides, that the bill of exceptions filed does not fully present all the difficulties experienced on the trial of this cause. Hence we have felt that it was difficult to render a decision which might not mislead the parties on a re-trial of the cause. We can, however, be governed only by the record presented to us. It is very defective, and, perhaps, on our own motion we ought to have sent it back to be perfected.

We might follow at some length the arguments of the counsel for respondent, and show that notwithstanding the facts may have been as presented in their argument, still the court erred in excluding the testimony offered. But should we do so we might be justly accused of presenting as many immaterial matters, in our opinion, as there

are immaterial issues presented by the pleadings in this cause.

In accordance with the views above expressed, the judgment of the court below is reversed, a new trial granted, and the cause remanded for further proceedings.

Exceptions sustained.

WARREN, C. J., concurred.

ANDERSON, appellant, *v.* O'LAUGHLIN, respondent.

PRACTICE—*statement—exceptions—new trial.* An order of the district court denying a motion for a new trial will be sustained, if there is no statement specifying errors, or bill of exceptions.

REPLEVIN—*return of property after verdict.* A judgment for costs and the return of the property follow a general verdict for defendant in a replevin suit.

PRACTICE—*motions under advisement.* It is not error for the district court to take motions under advisement from one term to another.

Appeal from the Second District, Deer Lodge County.

ANDERSON brought this suit in May, 1867, in the justices' court of Deer Lodge county, NEWCOMER, J., to recover the possession of a horse of the value of $80. The cause was appealed and tried in the district court in July, 1867. The jury returned the following verdict:

"We, the jury in the above cause, find for the defendant."

Anderson filed a motion for a new trial because the verdict was illegal in not specifying the property and giving its value, and finding that it should be returned. The defendant filed a motion for the entry of judgment on the verdict. The court, WILLISTON, J., took both motions under advisement. At the following October term, the motion for a new trial was denied, and judgment was entered upon the verdict for the defendant. The other facts are given in the opinion.

BROWN & MCMURTRY and WORD & SPRATT, for appellant

The answer raises two issues; first, the unlawful detention of the property; second, the title of respondent to the property. The general verdict does not show on which of these issues the jury based their finding. This verdict will not authorize a presumption of law that the property was in the respondent and that he was entitled to its return. Under the answer, respondent might have had a verdict as to the unlawful detention, and the court had no right to suppose it was for any thing else. The verdict was erroneous in not finding that the respondent was entitled to a return of the property. The statute is imperative and requires the jury, not the judge, to find this fact. Acts 1865, 73, § 150. The verdict was erroneous in not finding the value of the property. "The jury * * * *shall* find the value," is the language of the statute. Acts 1865, 73, § 150. The court did not find the value when judgment was entered.

The court below had no right to submit all the issues to the jury, and then permit them to find one-half, and find the other half himself. The appellant had a right to have every issue raised by the pleadings tried by a jury. The statute points out the only three ways by which the court can try or find an issue of fact, and in this case the court usurped the powers of the jury. Acts 1865, 73, §§ 152 and 153.

The case was tried in July, 1867, and judgment was rendered at the October term, 1867. The statute then required the judgment to be entered within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument. The court made no such order. Acts 1865, 77, § 173. This statute is imperative, and the judgment is null and void.

L. J. SHARP, for respondent.

The main issue in the pleadings is the title to the horse. A general verdict for defendant is a finding on the chief issues. *People* v. *March*, 6 Cal. 547; *Kidd* v. *Laird*, 15 id. 182.

In an action of replevin, a general verdict for defendant entitles him to a judgment for the return of the property. *Waldman* v. *Broder*, 10 Cal. 379; *Nickerson* v. *California S. Co.*, id. 521; *Hunt* v. *Robinson*, 11 id. 277; *Treat* v. *Lafarge*, 15 id. 41.

If there was any error in the verdict or judgment, appellant cannot complain of it. A judgment will not be reversed for an error which does not prejudice the rights of the parties. *Kilburn* v. *Ritchie*, 2 Cal. 148; *People* v. *Moore*, 8 id. 94; *Kidd* v. *Laird*, 15 id. 182.

The words "may" and "shall" in the statute referred to by appellant are convertible terms. *Cook* v. *Spears*, 2 Cal. 412; Acts 1865, 73, § 150, and 78, § 176.

WARREN, C. J. This was an action of replevin, tried, on appeal from a justices' court, in the district court of the second judicial district, in the county of Deer Lodge. No complaint or statement of the cause of action was filed, but no objection is raised to that omission. The respondent filed his answer to the allegations contained in the affidavit of appellant, for delivery of the property claimed.

The answer denies the ownership and right of possession alleged by appellant, and sets up title and right of possession in respondent, and claims damages for the taking and detention of the property, the value of which is not denied.

The property had been taken under this proceeding from the possession of respondent and delivered to appellant, and the answer claims return thereof. Upon trial of the issues the jury found a general verdict for the defendant, respondent in this cause.

Appellant entered a motion for a new trial, and respondent moved for an order for return of the property replevined, and for judgment for his costs. Both motions were taken under advisement by the court, and, at the following term, an order was made overruling the motion for a new trial, and judgment was rendered on the verdict against appellant for costs and for return of the property, from which this appeal is taken.

So far as the order overruling the motion for a new trial is concerned, it is only necessary to say that no statement specifying errors, or bill of exceptions, was filed in the court below, and consequently the order must be sustained.

We see no error on the face of the record before us of which appellant has a right to complain. He is not injured by the form of the verdict. The respondent might complain that the jury failed to find, in their verdict, the value of the property; that he was entitled to a return thereof, and to assess his damages, but the appellant cannot. Upon a general verdict for defendant upon these issues under our statute, as well as at common law, an order of return and judgment for costs followed, as a matter of course.

The court did not err in taking the motions under advisement.

The judgment and order of the court below is affirmed, with costs.

Exceptions overruled.

KNOWLES, J., concurred.

LEE, respondent, *v.* HUDSON, appellant.

PLEADING — *complaint.* The allegation of the release of a debt due the plaintiff is sufficiently set forth in the complaint in this case.

Appeal from the Third District, Lewis and Clarke County.

ON September 16, 1868, Lee filed his complaint in the justices' court of Lewis and Clarke county, A. J. Edwards, Esq., justice, and alleged:

"That, on or about the 25th day of August, A. D. 1868, one James Allen was indebted unto the said plaintiff in the sum of $125; that the above-named defendant, on the day aforesaid, was indebted to the said Allen in a sum of money greater than that due from said Allen to this plaintiff; that, at the special instance and request of said defendant, this plaintiff agreed to take the said defendant for the payment

of the said sum due from the said Allen to this plaintiff, and to accept of his promise to pay the said sum in satisfaction of said debt; that this plaintiff did then and there so take and accept of the said defendant's promise and liability, and the said Allen then and there released said defendant from his liability to him the said Allen, to the extent and amount of this plaintiff's claim, to wit: the sum of $125, whereby the said defendant became liable to pay this plaintiff the said sum of $125; and on the 1st day of September, A. D. 1868, did pay this plaintiff upon said sum the sum of $75, leaving a balance due and unpaid from the said defendant to the said plaintiff, at the time of the commencement of this suit, and is now due and unpaid."

The case was appealed to the district court, and tried in October, 1868. After the plaintiff closed his testimony, the defendant moved for a nonsuit, upon the following grounds: That plaintiff's complaint contained no allegation that the original debt, due from Allen to plaintiff, was ever canceled, or that Allen was released from his debt to plaintiff at the time of the transaction specified in the complaint. The court, KNOWLES, J., denied the motion, and defendant excepted.

J. A. JOHNSTON, for appellant.

CHUMASERO & CHADWICK, for respondent.

No briefs on file in this case.

WARREN, C. J. The release of the old debt, due from Allen to the plaintiff, is sufficiently alleged in the complaint.

The judgment is affirmed, with costs.

Exceptions overruled.

KNOWLES, J., concurred.

TERRITORY OF MONTANA, appellant, *v.* MCELROY, respondent.

INDICTMENT—*officer taking illegal fees.* An indictment against a party for taking illegal fees, as a justice of the peace, must allege that he was such officer.

Appeal from the Second District, Deer Lodge County.

MCELROY was indicted in September, 1868, by the grand jury of Deer Lodge county. The indictment alleged "that James McElroy, an acting justice of the peace for Elk township, in the county * * * while acting in that capacity as such officer in said township, * * * willfully did receive and take fees not allowed by law from * * * in the case of * * * then and there had and held before him to do and execute his duty as such officer therein, and then and there, at the time aforesaid, willfully and corruptly did ask and demand fees not allowed by law from * * * in the case of * * * as a condition precedent to the performance of his duties as such officer * * * ."

The defendant moved to quash the indictment because it did not state facts sufficient to constitute a public offense. The court, KNOWLES, J., sustained the motion and the defendant was discharged. The Territory appealed.

W. J. STEPHENS, District Attorney, Second District, for appellant.

It is sufficient to state generally in the indictment that defendant is such officer without setting forth his appointment. Proof that defendant has acted as such officer is sufficient. 2 Chit. Cr. L. 259.

There is no conflict between section 110 of the criminal practice act, making it criminal to officiate, and section 112, making it criminal for such officer to receive fees not allowed by law.

He who usurps an office is in by his own wrong, and cannot defeat an action for taking illegal fees by proving that he is not such officer. "No person can take advantage of his own wrong."

SHARP & NAPTON, for respondent.

The indictment is found under section 112 of the criminal practice act. The very essence of the offense is, that the defendant, being a duly elected and qualified officer, received illegal fees, etc. The indictment only shows that he was an "acting officer." 1 Whart. Am. Cr. L., §§ 285, 1289 and 1292.

It would be no defense under this indictment to prove that the defendant was not a lawfully authorized and qualified officer. Usurpation of the duties or functions of an officer is made an offense by section 110 of the criminal practice act.

WARREN, C. J. This was an indictment under the statute against the respondent, as a justice of the peace, for willfully receiving fees not allowed by law. The indictment was defective in not alleging in the language of the statute that the defendant was such officer. This allegation might have been supported by proof that he acted as such.

The order of the court below is affirmed.

Exceptions overruled.

KNOWLES, J., concurred.

LOEB, appellant, *v.* SCHMITH et al., respondents.

PRACTICE—*default set aside*. The setting aside of the default in this case was not an abuse of the discretion of the court below.

Appeal from the Second District, Deer Lodge County.

THIS was an action on a promissory note commenced by Loeb in the district court. The complaint was filed and summons was issued on July 25, 1867. The names of the parties on the complaint were "Leon Loeb *v.* Jacob Smith & Co., and Joseph Holzbauer *et al.*" The summons contained a notification to "Jacob Smith & Co. and Joseph Holtzbauer, Henry Apple." The sheriff made the follow-

ing return: "Served the within by reading to Henry Apple, on 1st day of October, A. D. 1867, on Bear gulch, Territory and county within mentioned." Judgment by default was rendered at the October term, 1867, against "Jacob Smith & Co. and Jos. Holtsbor *et al.*" for $907.

On September 10, 1868, a new complaint, for the same cause of action, was filed by Loeb against eight defendants, who were separately named, and included "Henry Appel." This complaint alleged that the defendants were partners at the time the note was made, under the firm and style of "Jacob Schmith & Co." The summons, which contained the names of these defendants, including "Henry Appel," was issued on the same day. The sheriff's return showed that personal service had been made upon "Henry Apple," on September 12, 1868, by reading the summons, and delivering a true copy of the same and a certified copy of the complaint. On September 23, 1868, judgment by default was rendered in the district court for $1,427.57, against all the defendants, and also "against the separate property of the said defendant, Henry Apple." On the same day the defendant, "Apple," filed a demurrer to the complaint, and also a motion to set aside the judgment against him. On October 2, 1868, the affidavit of R. H. Williams, Esq., the attorney of "Eppel," was filed in support of this motion, and stated the following facts: That he wrote the demurrer in good faith, and forwarded it to be filed from Beartown (so-called); that he made a special agreement with the express agent (no United States mail being then established between Deer Lodge City and Beartown) to carry through and deliver the letter containing the demurrer; that three days of the statutory time to answer were yet to expire when the letter was expressed; that only one day is necessary to carry mail matter from Beartown, where the summons was served, to Deer Lodge City; and that through the delay of the express agent, and without any fault of "Eppel," the letter was not delivered until one day after the time for answering had expired.

That Appel had never been a member of the firm described

in the complaint; that judgment had been obtained at the October term, 1867, on the note sued upon; that said judgment was still valid, and no new cause of action had accrued; and that affiant had written to Eppel to be in court at 10 A. M. of October 2, 1868, and placed the letter post-paid in the U. S. post-office of Deer Lodge City four days ago, but had received no answer, and, therefore, affiant made this affidavit.

No other affidavits were filed.

The note was as follows:

"604.50. One day hafter dayt we promise to pay to L. Loeb, or bearer, the sum of six hundred and four dollars 50c., for value received, whit interest from date at 5% per each month.

BEAR TOWN, *June* 30, 1866.

Mr. Loeb will stamp this if stamps are had.

JACOB SCHMITH CO.,
JOSEPH HOLZBAUER.

JACOB SCHMITH CO.,
JOSEPH HOLZBAUER."

Internal Revenue, 50 cts., canceled.

The court, KNOWLES, J., set aside the judgment on October 8, 1868, and allowed the defendants till 2 o'clock P. M. to answer, on the payment of all costs. The plaintiff excepted.

ROBINSON & STEPHENS, for appellant.

The court abused its discretion in setting aside the default. The affidavit on which the order was based was insufficient, and made by an improper party; and there was no answer with the affidavit. *Bailey* v. *Taafe*, 29 Cal. 422. Apple should have made the affidavit instead of Williams, his attorney. Apple used no diligence to appear within the statutory time. The sending of a frivolous demurrer by express, instead of an answer to parties, not known to the record, is not diligence. The affidavit must show that the default was the result of mistake, surprise, inadvertence or excusable neglect. Prac. Act 1867, 146, § 68; *Harlan* v. *Smith*, 6 Cal. 173; *People* v. *O'Connell*, 23 id. 281.

Every fact necessary to be shown to authorize the court to

set aside the default must be shown by the affidavit of a person, who could testify upon the trial of the cause to the facts. Williams' knowledge is derived from the statements of others, and is not competent proof by affidavit to establish the connection of Apple with "Schmith & Co." Williams' affidavit is inconsistent. It shows that Apple was not a party to the note sued upon, and that a former judgment against Apple is in force, without any new cause of action accruing.

There should have been an answer with the affidavit, as the complaint was verified, and there was nothing from Apple under oath to indicate that he had a defense. See authorities cited above.

R. H. WILLIAMS, for respondent.
No brief on file.

WARREN, C. J. This is an appeal from an order of the second judicial district court setting aside a judgment entered in vacation by default, against Henry Eppel or Apple, one of the defendants below, with leave to answer, upon payment of costs. The setting aside of the default rested in the discretion of the court below upon the facts disclosed in the affidavit, and we see no such abuse of that discretion as calls for the interposition of this court.

The order is affirmed and the cause remanded.

Exceptions overruled.

KNOWLES, J., concurred.

CARPENTER, respondent, *v.* RODGERS, Territorial Auditor, appellant.

STATUTORY CONSTRUCTION — *retroactive effect.* Section 6 of the act of congress amending the organic act of this Territory, approved March 2, 1867 did not have a retroactive effect and give full force to a law from the date of its first enactment, which had been annulled by congress and re-enacted by a subsequent legislature of Montana.

STATUTORY CONSTRUCTION — *meaning of said section.* In passing said section 6, congress gave to subsequent territorial legislatures the right to re-enact certain laws that had been annulled by congress.

STATUTORY CONSTRUCTION — *historical facts referred to.* This court can refer to the history of the Territory to ascertain the proper construction of a statute which is ambiguous.

STATUTORY CONSTRUCTION — *repugnant proviso void.* A proviso which is inconsistent with any reasonable intention of the assembly which passed it, and repugnant to the body of the act, is void.

Appeal from the First District. Madison County.

IN January, 1868, Carpenter filed his affidavit, and applied for a peremptory writ of mandate. After a hearing at chambers, the court, HOSMER, J., issued the writ in accordance with the application, and Rodgers appealed. The facts appear in the opinion.

W. M. STAFFORD, district attorney, first district, and DAVIS & THOROUGHMAN, for appellants.

(No brief on file.)

WORD & SPRATT, for respondent.

The first legislature created the office of superintendent of public instruction. Acts 1865, 433. The law fixing the salary was passed by the second legislature on April 10, 1866. Acts 1866, 17. This last act was recognized as the law of this Territory, until its repeal by the amended organic act of March 2, 1867.

The legislature, elected under the provisions of the sixth section of this act, assembled on the first Monday of November, 1867. By an act approved December 24, 1867, this legislature re-enacted the law of April 10, 1866. Acts 1867, 255, § 6. The only difference between them is a slight increase of salary. The respondent was in office at the time of the passage of this act. An equitable construction of these statutes would award him his salary. The Territory has received the benefit of his labors, and he should be paid therefor. This is a controversy between the Territory and one of its citizens. A court will never presume that it was the intention of the legislature to perpetrate a fraud

by receiving respondent's labor, and declare that the law giving him his salary had no application to his case. Smith's Stat. and Const. Law, §§ 694, 695.

The last proviso of the sixth section of the act of congress of March 2, 1867, is repugnant to, and repeals all parts of the section in conflict with it. Does this section make all the laws passed in 1866 void? Does it suspend them until the election of the legislature provided for? The first part of this section makes the laws void, but the proviso repeals this part. Sedg. Stat. and Const. Law, title "Proviso;" Smith's Com., §§ 578, 579.

We contend that the laws of the two legislatures of Montana, in 1866, were not repealed by this act of congress. They were only suspended until an election of the legislature should take place, as provided for in the act. That election took place before the commencement of this suit. The act of April 10, 1866, was then in full force, fixing respondent's salary. Respondent is entitled to recover under this act, even if this court should be of the opinion that the act of December 24, 1867, is not applicable.

KNOWLES, J. This cause comes to this court on appeal from a judgment of the district court of the first judicial district of this Territory awarding the respondent, A. M. S. Carpenter, a peremptory writ of mandamus against the appellant, Wm. H. Rodgers, as territorial auditor, commanding him to issue to respondent territorial warrants for the sum of $253.33, for salary as superintendent of public instruction for the Territory.

The facts presented in the record are as follows: Carpenter was appointed by the acting governor for this Territory superintendent of public instruction, and confirmed by the legislative council on the 4th day of March, 1867. He entered upon and performed the duties of that office from that time until January 4, 1868. The law providing for the office of superintendent of public instruction was enacted by the first legislative assembly. No salary was provided for such officer until a law was enacted fixing the same by the

second legislative assembly. On the 2d day of March, 1867, two days before the appointment of Carpenter to said office, congress amended the organic act of this Territory.

The construction of section 6 of this amendment is the only difficulty presented to the court in deciding this case.

It is contended by the respondent in the first place that the act of the fourth legislative assembly, entitled "An act to define the duties of territorial superintendent of public instruction," was a re-enactment of the law of the second legislative assembly upon the same subject, which rendered this act of the second legislative assembly valid.

The portion of the section under consideration which it is claimed had this force and effect reads as follows:

"And be it further enacted, That all acts passed at the two sessions of the so-called legislative assembly of the Territory of Montana, held in eighteen hundred and sixty-six, are hereby disapproved and declared null and void, except such acts as the legislative assembly herein authorized to be elected shall, by special act in each case, re-enact."

Let it be granted that the act of the fourth legislative assembly, entitled "An act to define the duties of territorial superintendent of public instruction," was a re-enactment of the statute upon the same subject by the second legislative assembly. Does this section have the force claimed for it? It is certain that the fourth legislative assembly did not expect that their act upon this subject was to have any retroactive effect, for the last section of their act reads as follows:

"This act to take effect and be in force from and after its passage."

We cannot think that congress intended to say that the acts of the legislative assembly of eighteen hundred and sixty-six, which the fourth legislative assembly should by special act in each case re-enact should be valid and go into effect from the date of the first enactment. The more reasonable view of what congress did intend to do is this: Congress no doubt entertained the opinion that should it

disapprove of and declare null and void the laws of the legislative assemblies of 1866, in an amendment to the organic act of the Territory, without giving power to any subsequent legislature to re-enact them, it would amount to a prohibition upon their re-enactment. Hence congress intended to give the privilege to any subsequent legislative assembly to re-enact them. To give this section any other construction would make it inconsistent with any reasonable intention on the part of congress. It had been decided by some of the courts of this Territory that the legislative powers thereof had lapsed, and that all the laws of the second and third legislative assemblies were void. In part to remedy the evils which it was found by this decision the people of this Territory were liable to suffer, this amendment to the organic act was passed.

At least the part of section 6 of this amendment under discussion does not declare that a re-enactment of an act passed by the legislative assemblies of 1866, by the legislative assembly authorized by the amendment, would make it valid. It declares that such acts of said legislative assemblies as the legislative assembles authorized by it shall specially in each case re-enact, it does not disapprove of and declare null and void. This construction, however, leaves all those acts which might be specially re-enacted, in each case, just where they were before the amendment to the organic act. And if upon a mature consideration by the courts it should be decided that such acts were valid, our statute books would present the anomaly of having two sets of statutes, identical, and purporting, as in this case, to go into force at different times. Or take the other construction, that upon the special re-enactment of these statutes, they should be made valid and be in force from their passage in 1866. No matter if this re-enactment should be years hence. We would still have the same unprecedented condition of affairs of two statutes, identical, and each going into effect at different periods. Should any of these be criminal enactments, for years they might be considered null and void. All at once upon their re-enactment

they would be considered valid and in force from the time of their first enactment. Is it reasonable to suppose that congress intended to leave the door open to any such state of affairs? If so, then instead of removing the evils by which the people of this Territory were beset, it has multiplied them and failed to satisfy the necessity for any such amendment and done violence to the very object of its passage. Take the other construction. If congress intended to leave the door open to test the validity of all laws which the legislative assembly it had authorized should in each case specially re-enact, it must have seen that it was leaving the door open for a vast amount of litigation instead of dissipating it and multiplying the opportunities for fraud and sharp practice upon the people of the Territory by designing men in subsequent legislative assemblies. If it should be found that such acts were valid, then all that would be necessary to bring them into force again would be to have them re-enacted. They would take effect from their first passage. And as in the former case, laws that had long been considered void, would come into force to affect the rights of property and liberties of the citizen. It will be seen from the first proviso in this section that congress supposed the door had been left open only to test the validity of the laws of 1866, where vested rights had accrued. Yet if the construction we have just considered be correct, then the opportunity is presented to test the validity of all laws re-enacted, whether there were any vested rights involved or not. We think there is ambiguity enough in this section to allow us to go outside of the wording of the statute to find the intention of congress. When this is done, there is no doubt but that the construction we have given to this portion of this section is the correct one. The last proviso in this section is more difficult of construction than any other portion of it. It provides "That no legislation or pretended legislation in said Territory, since the adjournment of the first legislative assembly, shall be deemed valid until the election of the legislative assembly herein provided for shall take place."

It almost appears in this that congress, no matter what may have been the actual intention, does say that when the legislative assembly provided for should take place that all legislation and pretended legislation in said Territory since the first legislative assembly should be deemed valid. Every legislative act ought to be so construed, if possible, as to make it consistent with itself. To give such a construction to this proviso as the one above, however, would make congress say in the first part of this section that all acts of the two legislative assemblies of 1866 were null and void, but that the legislative assembly authorized might have the liberty, by a special act in each case, to re-enact them. And in the latter part of it, that upon the election of the legislative assembly provided for, not only all the legislation of these two assemblies, but of any other legislative assemblies or pretended legislative assemblies since the first legislative assembly, should be deemed valid, which would do away with any necessity of their re-enactment. Surely there is ambiguity enough presented here to permit a court to look at the extraneous facts to find the proper construction of this statute.

It is, we believe, a part of the history of this Territory, that about the time this amendment to our organic act was passed, the governor of this Territory had convened an extra session of the legislative assembly. The only solution of this remarkable proviso is, that congress intended to annul the laws of this assembly until the election of the legislative assembly authorized should take place. Had that legislative assembly continued its labors, we would, no doubt, be forced to the construction that, upon the election of the legislative assembly provided for, all its acts would be deemed valid, if this is the proper construction of this proviso. Perhaps, however, it is too broad in its terms to receive any construction which would confine its application to one legislative assembly.

There is one thing to be observed in this proviso. It is not in the usual form of one. The usual effect of a proviso is to limit, in some enumerated particulars, the general effect

of the purview of an act. This, however, if it has the force and effect claimed for it by the respondents, would repeal the purview of this section, and leave it no functions to perform whatever. In fact, this proviso giving it the construction claimed for it, is totally repugnant to the whole purview of the section, and makes the act, instead of an annulling act, one enacting that upon the happening of a certain event which the amendment to the organic act, of which this section is a part, provides, shall take place not only all legislation, but all pretended legislation in this Territory since the first legislative assembly shall be deemed valid. Some authority has been cited to the effect that, when a proviso is repugnant to the purview of a statute, the proviso should stand, and be deemed a repeal of the purview.

KENT says: "A saving clause in a statute is to be rejected when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself." See 1 Kent, 522.

Again, in discussing the rule that had been laid down in relation to a proviso, he says: "But it may be remarked upon this case of Fitzgibbon, that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause. And it is difficult to see why the act should be destroyed by the one and not by the other; or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected." See 1 Kent's Com. 523.

It is difficult to see why a proviso which makes an act inconsistent with any reasonable intention on the part of the legislative body which enacted it, and makes it inconsistent with itself, and is totally repugnant to the body of the act, and destroys its effect altogether, should stand. After a mature consideration we are impelled to the conclusion that it should not; and, as the effect claimed for this proviso is as above stated, we are compelled to hold if that is its proper construction it is void.

In accordance with the views above expressed, it is

ordered that the judgment of the court below be reversed, and that a peremptory writ of mandate be denied.

Writ of mandate denied.

WARREN, C. J., concurred.

The legislature, by an act approved January 12, 1872, appropriated $241.12, in payment of Carpenter's claim for services as territorial superintendent of public instruction.

WILSON, respondent, *v.* DAVIS et al., appellants.

RECEIVER—*no appeal from his appointment.* No appeal lies from an order of the district court for the appointment of a receiver.

JURISDICTION CONFERRED BY LAW. An agreement of parties cannot confer upon this court jurisdiction, which is not given by law.

Appeal from the First District, Gallatin county.

THIS case came before the court at the August term, 1870, and the facts are contained in the report on page . In October, 1867, Wilson brought this action in the first district in Gallatin county. After a hearing at chambers, the court, HOSMER, J., appointed a receiver to take charge of the property in controversy, and issued an order restraining some of the defendants from interfering with the same. The other facts appear in the opinion. Upon the hearing on appeal, the appellants filed the affidavit of T. Thoroughman, Esq., one of their attorneys, who testified as follows: That the attorneys of respondent, at the time appellants took their exceptions in this cause, orally waived all notices and other legal formalities on appeal.

The arguments of counsel upon the merits of the cause are omitted.

DAVIS & THOROUGHMAN and WOOLFOLK & TOOLE, for appellants.

The affidavit of Thoroughman, on file in this case, shows that all notices and other legal formalities were waived at

the time of the exceptions. No counter affidavit has been filed, and respondent is concluded by the said affidavit. This appeal is as perfect as if all the requirements of the statute had been complied with. If this court believes that such a stipulation was made, as shown by said affidavit, respondent cannot now deny the same without proof, and thereby practice a fraud and deceit upon appellants. Appellants have no remedy for such an injury, as the time within which such notices must be given has long since elapsed. We hold that a sense of justice, binding in the mind of all courts, would declare that such agreements are binding and must be faithfully kept.

The record shows that appellants at the time excepted to the action of the court below in appointing a receiver, and refusing to dissolve an injunction restraining some of the appellants; and that appellants then filed their bond of appeal upon both questions, and thereby took them to the supreme court.

W. F. SANDERS and WORD & SPRATT, for respondent.

This appeal should be dismissed. The case is governed by the practice act of the first legislature. No appeal bond has been filed as required by law. Acts 1865, 97, § 263.

No notice of the appeal was ever filed or served upon the respondent. The service of the notice may be a legal formality, which may be waived, the filing of the notice is not a legal formality. It is the appeal itself. This court has no jurisdiction without such notice being filed, and no jurisdiction can be conferred by the consent or agreement of parties. That which the statute requires is not a "formality" simply. Acts 1868, 95, § 252; *Bonds* v. *Hickman*, 29 Cal. 460; *Wakeman* v. *Coleman*, 28 id. 58; *Hildreth* v. *Gwindon*, 10 id. 490; *Franklin* v. *Reiner*, 8 id. 340. The transcript must show that the notice of appeal was filed; that service of the same was waived, if it was not served; and that an undertaking was filed within the time prescribed by law. See authorities cited above.

No appeal is allowed by law from an order of court

appointing a receiver, until after final judgment. Acts 1865, 95, § 251. The appellants took exceptions to the order appointing a receiver made on November 9, 1867. The injunction was not granted until December following. No exception was taken to this order, and no appeal was taken therefrom. Appellants cannot appeal from one intermediate order and ask the court to review other orders of the court below.

WARREN, C. J. This purports to be an appeal from an order made in this court at chambers by Hon. H. L. HOSMER, judge of the first judicial district court at Madison county, on the motion of the respondent appointing a receiver.

The appointment of a receiver is an interlocutory proceeding, and from such an order no appeal lies. The record shows no motion to dissolve the injunction, and no order refusing to dissolve it, and no final judgment or order from which an appeal could be taken.

The bill of exceptions filed with the transcript, and the original bond filed in this court, show that it was intended to appeal from the order of the court appointing the receiver. No notice of appeal appears to have been filed or given, but an affidavit accompanies the record that all legal formalities were orally waived by respondent on the appeal.

No agreement of parties can confer upon the court a jurisdiction which is not given by law.

The appeal is dismissed, with costs.

Appeal dismissed.

KNOWLES, J., concurred.

KLEINSCHMIDT, appellant, *v.* MORSE, respondent.

PRACTICE — *appearance — waiver of summons.* A party appears generally in an action and waives a summons, if he comes into court, without limiting his object in so doing.

PRACTICE — *appearance — signing stipulation.* The signing of a certain stipulation in this case was a general appearance.

Appeal from the Third District, Lewis and Clarke County.

IN December, 1867, Kleinschmidt commenced this action upon certain drafts in the district court. In February, 1868, an amended complaint was filed and an alias summons was issued, which was returned by the officer as personally served. On March 2, 1868, the defendant appeared specially, and moved to quash the alias summons, and the return of service indorsed upon it. This motion was sustained by the court on March 9, 1868.

In December, 1867, Kleinschmidt obtained a writ of attachment, and defendant filed a plea in abatement of the same on March 12, 1868. It commenced as follows: "And now comes Benajah Morse, * * * defendant, and files this his plea." * * * This was verified by the defendant. Afterward, but upon the same day, a stipulation of the parties was filed, which is contained in the opinion. Judgment was then rendered for plaintiff for $16,880. On June 3, 1868, the defendant filed a motion to vacate this judgment. The court, MUNSON, J., sustained the motion, and plaintiff excepted.

The other facts appear in the opinion.

WOOLFOLK & TOOLE, for appellant.

The court, instead of quashing the alias summons, should have continued the case, and given the proper time to plead. The court had no authority to set aside a final judgment, on motion, at a term of court, after such judgment was rendered, when the records show that there was personal, but insufficient service. *Wilson* v. *Cleaveland*, 30 Cal. 192; *Suydam* v. *Pitcher*, 4 id. 280; *Castro* v. *Richardson*, 25 id. 49; *Willson* v. *McElroy*, 25 id. 169; *Lattimer* v. *Ryan*, 20 id. 628; *Shaw* v. *McGregor*, 8 id. 521.

The plea in abatement, filed in open court, was a waiver of service. A party may appear in person, or by attorney, without service of summons. Acts 1867, 138, § 22; *Suydam* v. *Pitcher*, 4 Cal. 280; *Adams* v. *Gilbert*, 9 Wend. 499; *Sterne* v. *Bentley*, 3 How. Pr. 331; *Hunter* v. *Lester*, 18 id. 347.

After respondent appeared and filed his stipulation, withdrawing all pleas and defenses, the court exercised its judicial discretion in rendering a judgment. This can only be reversed on appeal, or set aside on motion and proper showing of merits at proper time. The authority of an attorney of record is always presumed, when he appears as such, and he may suffer or confess judgment for his client. *Foster* v. *Wood*, 30 How. Pr. 285; *Denton* v. *Noyes*, 6 Johns. 301; *Blodget* v. *Conklin*, 9 How. 444.

Other rights have intervened and attached upon this judgment. If respondent had made proper showing of merits at the proper time, the court should have ordered the judgment to stand, subject to those rights, and respondent should have been permitted to answer and defend. *Sterne* v. *Bentley*, 3 How. Pr. 331; *Hallett* v. *Righters*, 13 id. 43.

This court should make such order in the premises as should have been made in the court below. While it devolved on respondent to show a meritorious defense, in order to set aside the judgment, appellant shows, by affidavits filed, that there is no such defense.

CHEMASERO & CHADWICK and G. MAY, for respondent. (No brief on file.)

KNOWLES, J. This cause comes to this court on appeal from an order of the court below, vacating and declaring null and void a judgment of that court.

It appears that at the time of filing the complaint in this action a summons was issued. This was quashed by order of court for a defective service. Afterward the plaintiff filed an amended complaint, and had an alias summons issued. The plaintiff, in the mean time, had filed his affidavit for a writ of attachment, to issue against the property of respondent. The respondent appeared in the action, and filed his plea in abatement. The court sustained the plea, and quashed the attachment proceeding. The counsel for

the respondent then gave the appellant the following stipulation, to wit:

Theodore H. Kleinschmidt, plaintiff, *agt.* Benajah Morse, surviving partner of the late firm of E. and B. Morse, defendant.

In the Territorial District Court, Third Judicial District, Lewis and Clarke County, M. T.:

The undersigned attorneys for the above-named defendant hereby consent and agree to withdraw all pleas and defenses in the above cause, and will interpose no objections to the taking of judgment in said cause.

Witness our hands this 12th day of March, A. D. 1868.

WILLIAM CHUMASERO,
GEORGE MAY.

Attest:
J. H. SHOBER.

This stipulation was filed in the action, and counsel for appellant moved for judgment, which was duly entered at the next term. Afterward the counsel for respondent moved to set this judgment aside, and to declare the same null and void, for the reasons set forth in the following motion:

"And now comes the defendant by his attorneys, William Chumasero and George May, and moves the court to annul and vacate the judgment entered at the last term of this court, in behalf of plaintiff against defendant, for reasons, 1. That the inspection of the records in said case shows an order quashing the summons and return in said case; 2. That the inspection of the records shows that there was no service of summons upon defendant, other than the one quashed, and therefore defendant could not be in default, and therefore that said judgment was improperly entered; 3 That the stipulation on file in this case, signed by the attorneys, did not authorize and justify the judgment entered in said case."

WILLIAM CHUMASERO,
GEORGE MAY,
Attorneys for Defendant.

The court sustained this motion, and vacated the judgment entered for the appellant. This was done at a term subsequent to the one at which the judgment was entered. We have been thus particular in setting forth the facts, that it may be seen upon what the court below based its action.

The twenty-second section of the civil practice act of this Territory provides as follows:

"That, after the filing of the complaint, a defendant in the action may appear, answer or demur, whether the summons has been issued or not; and such appearance, answer or demurrer shall be deemed a waiver of summons."

The first question presented to the court is, did the defendant appear generally in the action? If he did, he waived any summons to appear. What is a general appearance in an action? A party coming into court in an action without limiting the object for which he comes in. The signing of such a stipulation as the one filed in this cause by defendant's attorney, has ever been considered a general appearance in a cause. The respondent then, as to this action, was in court, and if he had failed to file a plea to the merits of the cause, the appellant was entitled to judgment if he claimed it. He asked for judgment, and the court properly awarded it.

We feel impelled to say one thing further in this cause. How was that stipulation considered by the attorneys for the appellant, and how did the attorneys for respondent have reason to suppose that the attorneys for the appellant regarded it? That it was an agreement by the defendant, Benajah Morse, that the plaintiff might have judgment for the amount he claimed. To give it any other effect would be to violate what was the manifest intention of the parties who gave it, the understanding of its effect by the parties who received it, and to recognize and encourage a system of sharp practice not to be tolerated in any dignified and upright court.

The order of the court below is, therefore, reversed and the cause remanded.

Exceptions sustained.

WARREN, C. J., concurred.

GODBE, respondent, *v.* MCCORMICK, appellant.

VENUE—*application for change*. The act of the legislature, regulating the place of trial in certain cases, approved December 6, 1867, gives a party the right to apply for a change of the venue of his case before the trial actually begins, although such application has been made and denied at the same term before the passage of this act.

STATUTORY CONSTRUCTION—*venue act—jurisdiction*. This act, approved December 6, 1867, affects the mode of procedure, but does not divest the district courts of the common-law jurisdiction conferred upon them by the organic act of this Territory.

IDEM—*validity of the venue statute*. This act, approved December 6, 1867, is upon a rightful subject of legislation and valid.

VENUE—*when changed—discretion of court*. The application for the change of the venue in this action was not addressed to the discretion of the court below. The statute is imperative and the application should have been granted upon the payment of the costs.

VENUE—*effect of denying application*. If a court erroneously denies a motion to change the place of trial, the subsequent proceedings in the case are void.

Appeal from the First District, Madison County.

THIS action was brought by Godbe in October, 1866, in the county of Edgerton (now Lewis and Clarke), to recover the amount due on a contract executed May 31, 1866, by Godbe and McCormick. The place of trial was afterward changed to the county of Madison. On December 2, 1867, during a term of the district court, the defendant filed a motion for a change of the venue of the action. The motion was overruled. On December 6, 1867, an act was passed by the legislature of the Territory, which contained the following clauses: "That when an affidavit is made by any party to said action or proceeding, or by his or their attorney, that the party making the application, and on whose behalf the affidavit is made, cannot have a fair and impartial trial in said action by reason of the bias or prejudice of the judge before whom said action is then pending, such judge shall, and it is hereby made his duty to immediately order said action to be transferred to some other county in said Territory, outside of his judicial district, on payment of the costs that have accrued in said cause in said court, up to the time of making such application." "This act

shall apply to all actions now pending or that may hereafter be brought in the Territory of Montana, and shall be in force from and after its passage."

On December 7, 1867, the defendant made the same motion for a change of venue which had been filed on December 2, 1867, and accompanied it with an affidavit that he could not have a fair and impartial trial by reason of the bias and prejudice of Hon. H. L. HOSMER, the judge before whom the action was then pending. The plaintiff then filed a motion to strike this application from the files. The court, HOSMER, J., sustained the motion and defendant excepted.

The cause was then tried by a jury, who rendered a verdict for plaintiff for $9,744. During the trial the defendant saved other exceptions which were not reviewed by the court, and are therefore omitted, together with the arguments of counsel thereon.

CHUMASERO & CHADWICK and DAVIS & THOROUGHMAN, for appellant.

The court erred in overruling the motion of appellant to change the venue in said action, made after the passage of the act of the legislature, regulating proceedings in civil causes, approved December 6, 1867, and before the repeal thereof. Acts 1867, 68; *Smith* v. *Judge*, 17 Cal. 547; 5 N. Y. Dig. 84, §§ 85 and 94; Sedgw. Stat. and Const. L. 5, 6, 10, 11, 13, 34, 183, 184, 187 and 204; Acts 1865, 24, § 21; Organic Act, § 6; *Fletcher* v. *Peck*, 6 Cranch, 87.

W. F. SANDERS, for respondent.

The motion for a change of venue was made too late. It was the second motion for the same purpose at the same term. Defendant had once made this motion and saved his exception to the ruling thereon. The second motion was improper.

The act of the legislature, approved December 6, 1867, is void. It deprives the district court of its common-law jurisdiction and seeks to make the judge a ministerial, not a judicial officer. The interference of the legislature in pend-

ing cases is a vicious practice. This act remained in force seventeen days. The motion was filed after the case was set for trial. After parties announce themselves ready for trial, the motion is too late. The statute is a wrongful interference with judicial discretion. Organic Act, § 9; 2 Tomlinson Law, D. 298.

If appellant made this affidavit in every district, respondent would be remediless, although Organic Act gives him a remedy. The act was not upon a rightful subject of legislation.

WARREN, C. J. The record in this case is somewhat voluminous, but it is unnecessary to notice all the errors assigned.

The appellant has preserved in the record his exception to the order of the court below, striking from the files the application for a change of the venue of the cause made by appellant on December 7, 1867.

The grounds upon which respondent's motion to strike this application from the files was based, were: 1. That a former motion for the same purpose had been filed and overruled; and, 2. That the latter application was not made until the cause had been set for trial. It is to be presumed that these were the reasons which controlled the court in sustaining the motion of respondent.

The latter application was made by appellant under the provisions of an act of the territorial legislative assembly, which was approved on December 6, 1867. The former motion for change of the venue was made under the law previously in force, and was addressed to the discretion of the court, and no error is assigned in overruling it. The appellant was entitled to the benefit of the change in the law, made on December 6th, subsequent to the order overruling his first motion.

The fact that the application was not made until the cause had been set for trial did not justify disregard of the law, which does not designate the time during the progress of [illegible] action or proceeding at which the application should be

made; and, consequently, it might properly be made at any time before the trial actually commenced.

This brings us to a consideration of the question raised by respondent, as to the validity of the act of December 6, 1867.

It is argued that this act was void, for the reason assumed that it attempted to divest the district court of jurisdiction of a case at common law, over which it had jurisdiction, by virtue of the organic act of this Territory.

By the organic act the judicial power of the Territory is vested in certain courts, and it is ordained, that the jurisdiction of the several courts thereby established "shall be limited by law," provided, that the "district courts respectively shall possess chancery as well as common-law jurisdiction." The legislative power is vested in the governor and legislative assembly, and the legislative power extends to "all rightful subjects of legislation, consistent with the Constitution of the United States" and the provisions of "the organic act."

The questions involved here are whether the act of the legislative assembly of December 6th, in terms or in substance, divested the district courts of the common law jurisdiction they possessed by virtue of the act of congress: and, secondly, whether the subject embraced was one of rightful legislation within the scope of the legislative power. So far as the first question is concerned, we do not regard the act of the legislature as affecting the jurisdiction of the district court. It lays down a rule of procedure, in certain cases, for the observance of the courts in the exercise of their jurisdiction, of the same character as the laws regulating continuances, appeals, new trials, and the entire subject of remedies and of practice. In the respect that it is mandatory upon the courts, it differs from our idea of wise legislation, and the fact that the law was so soon repealed would seem to indicate that the legislature itself became convinced that in such cases a sound discretion should be left to the courts; but, with the wisdom and policy of legislation, the courts have nothing to do. Refusal to recognize

and obey a law upon the ground of judicial disapproval of its policy, would be at once to place courts above the law, instead of remaining its ministers and expounders. That courts should firmly maintain their legitimate powers against legislative aggression, as is ably urged by the attorney of the appellee, we believe.

A division of the powers of government among three co-ordinate departments, as in the federal constitution, the several State constitutions, and in our own organic act, is most wise and salutary, and that each branch should be restricted within its particular sphere of action, is a truism, but to determine the precise boundary between the several departments is sometimes attended with great difficulty. The mere fact that a law requires the performance by a court of a particular act, upon a given state of fact, is not a sufficient test by which to determine its invalidity, and in many instances the legislature may deprive the court of discretion in the exercise of its jurisdiction. To find limitations upon the legislative power we must look to the constitution and acts of congress, and, looking to these, we are unable to find any provision that was violated by the act of December 6th, or to say that it was not upon a subject of rightful legislation. It is also insisted that the court properly struck respondent's application from the files, for the reason that the costs which had accrued in the cause previous to the application were not paid or tendered by the appellant. This was not one of the grounds assigned by respondent in his motion, and is untenable. The order changing the place of trial should have been made upon condition of payment of the costs. We are of opinion that the court below erred in striking the appellant's application from the files. The appeal is from the final judgment rendered in the case, but, regarding this error as material, and affecting the judgment, we do not think it proper to discuss the subsequent questions involved in this record. We may say that we are unable to discover in the record evidences of the bias or partiality alleged in appellant's affidavit, but the statute, being imperative, should have been obeyed, and

the proceedings subsequent to December 7th, in the cause, were unwarranted by the law. We cannot forbear remarking, in conclusion, that much of the difficulty arising in this case sprang from the loose and ambiguous pleading on the part of the appellant. Under our system of practice, the tendency is toward indefiniteness in the formation of issues of fact, and the rules of pleading as established cannot be too strictly enforced.

The judgment is set aside and the cause remanded to the court below.

Exception sustained.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1869, HELD IN VIRGINIA CITY.

Present:

HON. HENRY L. WARREN, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. GEORGE G. SYMES, }

CARUTHERS et al., appellants, *v.* PEMBERTON et al., respondents.

PLEADING — *reply required if answer prays for relief.* An answer which contains new matter in avoidance needs no reply under the statutes of this Territory, unless it states facts that entitle the defendant to affirmative relief.

WATER-RIGHTS — *capacity of ditch.* The measure of the plaintiffs' right to water in controversy in this case is the number of inches that their ditch would convey from the point of diversion without running over its banks.

PRACTICE — *when judgment is not reviewed.* This court will not review a judgment when it appears from the whole record that justice has been done.

PRACTICE — *new trial — newly-discovered evidence — affidavits.* A new trial will not be granted on the ground of newly-discovered evidence, if the affidavits do not show what diligence was used to obtain it, and the evidence is cumulative.

Appeal from the Second District, Deer Lodge County.

THIS action was commenced in the district court in November, 1868, by Caruthers and others against Pemberton and others. The plaintiffs owned a water-ditch, known as the De Long ditch, which diverted the waters of Gold creek in Deer Lodge county prior to September 1, 1868. The defendants, who then did business in said county under the name and style of the Pioneer Ditch Company, owned a ditch, known as the Pioneer ditch, which diverted the waters of Gold creek about two miles above the head of the De Long ditch. The plaintiffs claimed that they were entitled by prior appropriation to the use of two hundred and fifty inches of water in the De Long ditch; and that the defendants, about September 1, 1868, wrongfully diverted the same and prevented it from flowing in their ditch. The prayer of the complaint was for a perpetual injunction restraining the defendants from diverting the water, and $3,000 damages. The answer alleged that the capacity of the De Long ditch to convey water was no more than one hundred inches according to miners' measurement; and that plaintiffs had always enjoyed the use of that amount since the construction of their ditch. No replication was filed by the plaintiffs.

The case was tried at the November term, 1868, and the jury returned a general verdict for defendants and also special findings. The court, KNOWLES, J., denied the plaintiffs' motion for a new trial and they appealed.

The other facts appear in the opinion.

J. C. ROBINSON, for appellants.

No replication is required under our statute. The court below erred in instructing the jury "that it was confessed by the plaintiffs in the pleadings that the appellants had had at all times as much as one hundred inches of water." Acts 1867, 141, § 38; 144, §§ 50, 65: *Bridges* v. *Paige*, 13 Cal. 640: *Piercy* v. *Sabin*, 10 id. 22: *Herold* v. *Smith*, 34 id. 122: Voorhies, N. Y. Code, § 153.

The jury should have passed upon any portion of the one hundred inches of appellants' water that was diverted by respondents. The court erred in giving the other instructions and admitting certain testimony. *Norwood* v. *Kenfield*, 30 Cal. 400; *Lally* v. *Wise*, 28 id. 540.

The showing of newly-discovered evidence is sufficient to entitle the appellants to a new trial.

The evidence was insufficient to support the findings and verdict of the jury. *Smith* v. *Atherton*, 34 Cal. 506; *Hill* v. *Smith*, 32 id. 167; *Franklin* v. *Dorland*, 28 id. 175.

CLAGETT & DIXON, for respondents.

The affidavits for new trial do not show surprise or diligence. They do not come within the statute. Prac. Act, §§ 193 and 194. The evidence which they contain is cumulative. This is no ground for a new trial. 1 Gr. & W. New Trials, 486; 3 id. 1016, 1048.

The statement shows the weight of evidence is in favor of respondents. A new trial will not be granted, if there is a conflict of evidence, or any evidence to support the verdict. 1 Gr. & W. New Trials, 380; *Kile* v. *Tubbs*, 32 Cal. 333; 3 Gr. & W. New Trials, 1239.

The instructions are correct, and are more favorable to appellants than respondents. The special findings covered all the issues.

Evidence was properly admitted to show that part of the water in plaintiffs' ditch came from Pioneer gulch, and that the lower portion of their ditch was larger than the upper. The instructions did not mislead the jury or prejudice the plaintiffs. A new trial will not be granted if the complaining party could not be injured by the instructions; nor if justice has been done. *Tompkins* v. *Mahoney*, 32 Cal. 231; 1 Gr. & W. New Trials, 301; 3 id. 862, 867, 868.

SYMES, J. This was an action brought by plaintiffs for damages for the diversion of water by the defendants, which the plaintiffs claimed by prior appropriation for mining purposes, tried at November term of the district court, 1868. Verdict and judgment for defendants.

The complaint alleges in substance that plaintiffs on and prior to September 1, 1868, owned and possessed a water-ditch, of the capacity of two hundred and fifty inches, miners' measurement, in Deer Lodge county, Montana Territory. It being an artificial water-ditch for diverting the waters of Gold creek, and known as the De Long ditch, and claimed by prior appropriation, waters of said creek, conveyed by said ditch to amount of two hundred and fifty inches. That on 1st of September, 1868, defendants wrongfully and unlawfully diverted the waters of said Gold creek and prevented same from flowing down plaintiffs' ditch, thereby damaging plaintiffs $3,000, for which they sue.

Defendants' answer admits plaintiffs' possession of said ditch; denies that ditch was of the capacity of two hundred and fifty inches, and alleges that at the time of appropriation ditch would convey one hundred inches and no more, and denies the diversion of any water belonging to plaintiffs. Answer further alleges that in August, 1866, defendants and those under whom they claim appropriated all the waters of said Gold creek then unappropriated, and constructed a ditch to convey same to Pioneer gulch, which ditch was of the capacity to convey six hundred inches, more or less, and known as Pioneer ditch, and takes the waters of said Gold creek about two miles above the head of said De Long ditch; that when Pioneer ditch was constructed De Long ditch would convey one hundred inches of water from said Gold creek and no more; that defendants were entitled to all the waters of said creek except one hundred inches, and had always allowed one hundred inches to flow down said De Long ditch without diversion. This case came up on order overruling motion for new trial, and errors and exceptions stated in the statement for same as follows:

1. On the trial defendants ask plaintiffs' witness, if he did not in fall of 1866, when mining in Pike's Peak gulch, convey water from Pioneer gulch to where he was mining? which was objected to by plaintiffs as irrelevant, overruled and exceptions. 2. Plaintiffs' witness, Cook, testified that he

capacity of plaintiffs' ditch was about one hundred and fifty inches. He thought so from amount of water flowing in Sharp and Williams & Co.'s bed-rock flume and amount they were compelled to use. On cross-examination, defendants asked witness if part of water in flume did not come out of Pioneer gulch? Objected to by plaintiffs as irrelevant. Overruled, and witness answered, it did. 3. Defendants asked their witness if part of the water which came through De Long ditch in 1866 to mines came from Pioneer gulch? Objected to by plaintiffs as irrelevant. Overruled, and witness answered, it did. If plaintiffs' witnesses formed the judgment of the capacity of plaintiffs' ditch by the amount of water flowing into a flume some distance below head of ditch or into some mine, it was certainly relevant for defendants to cross-examine plaintiffs' witnesses, or show by their own witnesses, that portion of the water in the flume or flowing into the mines came into flume, mines or De Long ditch, below where said ditch took the water from said Gold creek. It might weaken their judgment or show that they knew nothing of the amount of water said ditch took from said Gold creek.

Plaintiffs excepted to the court instructing the jury that plaintiffs admitted in their pleading that defendants had always permitted one hundred inches of water to flow down said Gold creek to said De Long ditch, because alleged in answer and no replication being filed by plaintiffs. The court erred in this instruction. Section 38, Civil Code, provides that the only pleadings on the part of the plaintiff shall be complaint, demurrer or replication to defendant's answer, and on the part of defendant shall be demurrer to complaint, or replication or answer to the complaint. Section 50 provides that where the answer contains new matter plaintiff may demur or move to strike out sham and irrelevant answers, or such part thereof as may be irrelevant, immaterial, etc. Section 65 provides that any material allegation of the complaint or cross-complaint, not controverted by the answer, shall, for the purposes of the action, be taken as true, and that the statement of matters in avoidance

shall, on the trial, be deemed controverted by the adverse party. Distinct sections of the Code prescribe what the complaint shall contain ; also the answer. But unlike most codes of the different States, there is in ours no section except those referred to which treats of a replication or form which we can deduce when it is necessary or what it should contain. Section 38 prescribes there shall be such a pleading as a replication, but no section states when it shall be necessary. Section 50 states that when answer contains new matter plaintiff may demur, move to strike, etc., but does not say he may reply. Section 65 states that material allegations in complaint or cross-complaint, not controverted, shall be taken as true. And that matter in avoidance in the answer shall be deemed controverted, thereby it seems to us saying that new matter in avoidance may not be controverted by a reply. In referring to the New York code we find the provisions as to the answer similar to ours, but a distinct section provides that a reply shall be necessary when the answer sets up new matter containing a counter-claim, and the decisions allow a reply only when matter is in the answer which entitles the defendant to affirmative relief against the plaintiff, or facts which would be sufficient to constitute a cause of action against the plaintiff. Van Plead, 616, 620, and cases there cited. The California code, before amendment, was the same as ours, and although the decisions on this question are not at present within reach of the court, it seems a reply was held necessary only when the new matter in the answer entitled the defendants to affirmative relief. The answer in this case contained no new matter constituting a counter-claim, or entitling the defendants to affirmative relief, and no replication was necessary. But, on examination of the statement of evidence, it seems to preponderate in favor of the conclusion that the defendants always did allow one hundred inches to flow down to the De Long ditch ; and the special findings of the jury show they so conclude. The plaintiffs' rights, therefore, were not prejudiced by this instruction.

Plaintiffs also rely on exceptions taken to the refusal of

instructions offered by them, giving instructions offered by defendants, instructions given by court and special finding, submitted by the court to the jury. That evidence is insufficient to support verdict, newly-discovered evidence entitling defendants to new trial, and order overruling motion for same.

Several instructions were asked by plaintiffs and refused; some asked by defendants and given, and several given by the court. Upon examining the instructions it is not seen how the jury were misled, or plaintiffs prejudiced by the ruling of the court, except it be in giving the second instruction given by court at request of the defendants, which instructs the jury that the measure of plaintiffs' right to water was the number of inches the De Long ditch would carry through to the place where it is to be used, at the time of defendants' appropriation in the fall of 1866. The measure of plaintiffs' right would be the amount of water the said ditch would convey from said Gold creek without running over its banks, and not the number of inches it might convey to the place to be used, some miles, perhaps, distant. In running some distance to mines, much water might be lost by evaporation and seepage, depending on season of the year and state of the weather; and the amount of water appropriated could only be estimated by measuring it according to miners' measurement, near the head of the ditch, when it was full, or conveying all it had capacity to. But, as the jury specially find, from the evidence, that the ditch was only of the capacity to convey one hundred inches to a claim near by; and, further, that the plaintiffs appropriated but one hundred inches of water of said creek, and the evidence favors the findings, the jury were not misled by this instruction. Courts will not disturb a verdict where there is evidence to support it, or reverse a judgment when, from the whole record, justice appears to have been done. The affidavits of newly-discovered evidence do not show what diligence, or that any, was used to obtain it, and the evidence shown is cumulative.

Exceptions overruled.

KLEINSCHMIDT et al., respondents, *v.* DUNPHY, appellant.

PAROL EVIDENCE OF WRITING NOT IN EXISTENCE. Parol evidence of a writing, the existence of which is denied by one of the parties to the action, is admissible, if the court is satisfied that the facts constituting a foundation therefor have been proved.

DECLARATIONS OF ONE PARTY MADE IN ABSENCE OF ANOTHER. The declarations of parties concerning a mortgage executed by them to one of the defendants, and made in the absence of this defendant, are admissible, if evidence has been introduced tending to show collusion between the parties respecting the instrument.

DISTRICT COURTS—*not federal courts.* The district courts of this Territory, created by congress, are not federal courts contemplated by the constitution.

STATUTE AUTHORIZING VERDICT BY THREE-FOURTHS OF JURY VOID. The act of the legislature of Montana which provides that the verdict of three-fourths of the jurors shall have the same effect "as if agreed upon by the whole of the jurors," approved January 15, 1869, is unconstitutional and void in actions at common law, in which the value at controversy exceeds $20

TRIAL BY JURY. A trial by jury is a trial by a tribunal of twelve men, acting only with unanimity.

JURY TRIALS IN EQUITY CAUSES. The constitution does not secure the right of trial by jury in causes of equity jurisdiction, and the legislature of this Territory possesses the power to determine the number of jurors that can render a verdict in the trial of issues of fact arising in such causes.

Appeal from the Third District, Lewis and Clarke County.

IN April, 1868, Kleinschmidt commenced this action in behalf of himself and other judgment creditors of B. Morse, surviving partner of the late firm of E. & B. Morse, against said B. Morse and Dunphy, in the district court in Gallatin county. The complaint alleged that Kleinschmidt recovered a judgment against said Morse, as said partner, on March 12, 1868, for $16,957.50; that an execution was issued upon said judgment, and returned by the sheriff on April 2, 1868, wholly unsatisfied; that said judgment had not been paid; that said E. & B. Morse, on October 31, 1867, executed to Dunphy a mortgage upon their real and personal property, to secure the payment of $30,000; that the property was worth $70,000; that the Morses, at the time the mortgage was executed, were indebted to their creditors in the sum of $39,000; that the mortgage was made with the intent to hinder, delay and defraud their creditors by

the Morses, who continued in the possession of the property several months after the execution of the mortgage; that the indebtedness described in the mortgage was fictitious, and that the Morses and Dunphy had so stated to divers persons; that the Morses, in October, 1867, owed Dunphy about $6,000, which was to be paid in Helena in flour, under an agreement of the parties; that Dunphy, by means of this mortgage and fictitious indebtedness, had prevented plaintiff, and other judgment creditors of the Morses, from collecting their demands; that Dunphy had forbidden the sheriff to levy upon said property, and the sheriff had returned unsatisfied the executions of creditors of the Morses to the amount of $35,000; that B. Morse, in conjunction with Dunphy, was disposing of the mortgaged property, and had realized over $30,000; that B. Morse and the firm of E. & B. Morse, and Dunphy, had nothing, except this property; and that plaintiff's judgment would remain unpaid if this mortgaged property was not applied to its payment.

The complaint prayed that the mortgage be adjudged fraudulent; that a receiver be appointed; that defendants be enjoined from disposing of the mortgaged property, and that plaintiff have judgment against Dunphy for the remainder due upon his judgment against the Morses.

On June 8, 1868, an amended complaint was filed, which contained the following additional allegations: That B. Morse, partner as aforesaid, on January 3, 1868, executed an assignment to Dunphy of the mortgaged property, and authorized him to dispose thereof, and that this assignment was fraudulent.

On June 22, 1868, Dunphy answered, and denied that the judgment in favor of Kleinschmidt, and against the Morses, was legally obtained. He alleged that the Morses made the mortgage on October 31, 1867, in good faith, to secure their indebtedness to him; that this indebtedness, with interest, was $30,000, and that he had received on account of the mortgage about $16,000. The material allegations of the complaint were denied.

The answer of B. Morse, which was substantially the same as that of Dunphy, was filed on June 22, 1868. The replication denying the new matter, set forth in the answers of Morse and Dunphy, was filed on the same day.

On June 23, 1868, C. E. Duer was made a party plaintiff upon his petition, which set forth that he was a judgment creditor of B Morse, as surviving partner, in the sum of $15,410.05. The complaint contained the same allegations as that of Kleinschmidt, and admitted a payment on the judgment of $250.98. Dunphy's answer to this complaint, and Duer's reply to the same, stated no new matter.

The appearance of B. Morse was withdrawn on June 27, 1868. The parties changed the place of trial to Lewis and Clarke county by agreement, and the case was tried by a jury in March, 1869.

During the trial Kleinschmidt testified as follows: "I had a conversation with Elkanah Morse, one of the firm of E. & B. Morse, in latter part of October, 1867; Elk. Morse showed me an agreement between E. M. Dunphy and E. & B. Morse, in which Dunphy agreed to cancel a certain mortgage made by him, whenever E. & B. Morse wanted Dunphy to do so; the paper was signed E. M. Dunphy; I recognized the handwriting as Dunphy's; I think the amount of the mortgage was stated, but don't recollect; I think the body of the instrument was in the handwriting of Elkanah Morse."

Dunphy denied that any such agreement was ever executed, and excepted to the ruling of the court, KNOWLES, J., in allowing the testimony to be introduced.

Kleinschmidt also testified that E. Morse told him he had executed a mortgage on all his property to Dunphy; that he did not intend that Hamilton and Herron should make any thing out of him, but the mortgage was not intended to affect his other creditors; that the agreement he showed him would protect him against Dunphy; that he had purchased $6,000 or $7,000 worth of goods from Dunphy, which he was to pay in flour; that he would keep the mortgage and agreement in his possession and be safe; that his

property was worth $45,000; that all of his indebtedness would be paid; and that the suit of Hamilton and Herron would probably go against him, and he would not put the mortgage on record unless in case of emergency.

Dunphy objected to the introduction of these declarations of E. Morse, made in the foregoing conversation in his absence. The objection was overruled, and defendant excepted.

Other witnesses testified regarding the declarations of E. Morse or B. Morse, concerning the mortgage in controversy, its amount, the manner of its payment, and the amount of the indebtedness due from the Morses to Dunphy on account of the mortgage, all of which were made in the absence of Dunphy. The defendant objected to the introduction of this testimony, and excepted to the ruling of the court in admitting it.

The court submitted to the jury twenty-one issues of fact, and instructed them that three-fourths of their number could find a verdict. The jury returned the findings upon these issues, in most of which nine jurors concurred and three dissented. The defendant objected to the entry of the verdict, because it was found by nine jurors. This objection was overruled, and defendant excepted.

On April 2, 1869, the court, KNOWLES, J., signed a decree in favor of plaintiff for $35,737, and $7,149 costs, in accordance with the findings. The motion of defendant for a new trial was denied, and defendant appealed.

Elkanah Morse, of the firm of E. & B. Morse, died on December 4, 1867. The judgment in favor of Kleinschmidt against Morse, which is referred to in the pleadings, was the subject of an appeal to this court in December, 1868; *ante*, p. 100.

CHUMASERO & CHADWICK, SHOBER & LOWRY, WORD & SPRATT and W. F. SANDERS, for appellant.

No lawful verdict was found by the jury, as twelve jurors did not agree in finding it. U. S. Const., Amend. 5 and 7; Organic Act, § 6; 1 Story's Eq., §§ 60, 72, 76; 3 Bl. Com. 431;

432; Sedgw. Stat. and Const. Law, 545, 546; 10 Bacon's Abr. 306, 315; 9 id. 564; 2 Bouv. Law Dict. 622; id. 113, 584; 3 Greenl. Ev., §§ 260, 264; 2 Sto. Const., § 1763; *Smith* v. *Pollock*, 2 Cal. 94; Whit. N. Y. Prac. 391; 2 Lead. Cr. Cas. 327; *Kruger* v. *Hudson R. R. R. Co.*, 12 N. Y. Ap. 198.

Oral evidence cannot be substituted for any written instrument, the existence of which is in dispute, and the production of which is material to the issues between the parties or the credit of the witnesses. 1 Greenl. Ev., § 88; 1 Phil. Ev., § 475; 2 Phil. Ev., § 422.

The respondent was enabled, by this improper testimony, to establish a false foundation for introducing evidence of the declarations of E. & B. Morse. There was no evidence that Dunphy or B. Morse ever had this instrument. Dunphy was the only party defending this suit, and the statutory rule, to produce papers, does not apply. Acts 1867, 220, § 422. Dunphy and B. Morse swear that no such instrument was ever executed. There was no evidence that Dunphy ever had any control over said instrument. How could Dunphy produce an instrument which he did not possess or control, and the existence of which he had denied under oath?

DAVIS & THOROUGHMAN and WOOLFOLK & TOOLE, for respondent.

Kleinschmidt could testify as to the contents of the writing executed by Dunphy to E. & B. Morse, after notice to produce the original had been served, and after B. Morse had been interrogated concerning its execution. Every means to obtain the original had been exhausted, and parol evidence of its contents was proper. 1 Greenl. Ev., §§ 82 to 91; Prac. Act 1867, §§ 380, 421, 422; *Gordon* v. *Searing*, 8 Cal. 49; *Hayden* v. *Palmer*, 2 Hill, 205.

The declarations of the Morses were not proved until evidence had been introduced showing collusion between them and Dunphy to defraud creditors, and that the Morses remained in the possession of the mortgaged property and exercised acts of ownership over it, after they claimed to

have delivered it to Dunphy. The question as to the foundation for the admission of this evidence was for the discretion of the chancellor below. In this case that discretion was properly exercised. 2 Phil. Ev. 177, 602; *Adams* v. *Davidson*, 6 Seld. 309; *Landecker* v. *Houghtaling*, 7 Cal. 392; *Ellis* v. *Janes*, 10 id. 456; *Visher* v. *Webster*, 8 id. 113; *Swartz* v. *Hazlett*, id. 128; *Seligman* v. *Kalkman*, id. 213.

The verdict of nine jurors was lawful. Acts 1869, 66, § 15.

Appellant took no valid exception to the charge of the court, directing that nine jurors should return a verdict. Exceptions to the whole charge, without pointing out the specific part excepted to, will not be regarded by this court if any portion of the charge is correct. Acts 1867, §§ 188, 189; *Hicks* v. *Coleman*, 25 Cal. 146; *More* v. *Del Valle*, 28 id. 174; *Jones* v. *Osgood*, 2 Seld. 234; *Hunt* v. *Maybee*, 3 id. 266.

All the authorities are clear that a jury trial may be waived. Appellants had no right to gamble for a verdict, and then object to receiving it, after it had been given.

The sixth and seventh amendments to the constitution, relating to trial by jury, do not affect State or territorial courts. Organic Act, §§ 6, 13; 2 Sto. Const. 575 to 579; *Ex parte Smith*, 10 Wend. 449; *Murphy* v. *People*, 2 Cow. 815; *Livingston* v. *Mayor*, 8 Wend. 102; Sedgw. Stat. and Const. Law, 543; *Am. Ins. Co.* v. *Carter*, 1 Pet. 546.

This is a bill in equity. Equity causes are not embraced in the provisions of the constitution, relative to trial by jury. It is expressly limited to "suits at common law," where the amount in controversy exceeds $20. 2 Sto. Const. 577 to 583; *Rathbun* v. *Rathbun*, 3 How. Pr. 139; *Lee* v. *Tillotson*, 24 Wend. 337; *Calhoon* v. *Levy*, 5 Cal. 294.

Equity will render judgment against a fraudulent vendee in favor of a creditor, when the fraudulent vendee has converted the property and thereby defeated the creditor's claim. Equity, having obtained jurisdiction for discovery, will retain it for relief. *Swinfield* v. *Rogers*, 23 Cal. 233;

Goodwin v. *Hammond*, 13 Cal. 168; Edw. Receivers, 415; *King* v. *Baldwin*, 17 Johns. 384.

WARREN, C. J. This was an action brought by respondents, as judgment creditors of the partnership firm of E. & B. Morse, to set aside a mortgage executed by said firm to defendant Dunphy, as fraudulent, and to subject the property conveyed thereby, in the hands of Dunphy, to payment of their respective judgments.

The cause was tried at the March term, 1869, of the district court, in and for Lewis and Clarke county, before KNOWLES, J., and a jury. The court submitted to the jury certain issues or questions of fact, and directed written findings thereon.

The jury returned their written findings upon the questions of fact, signed by their foreman, and by three of the jurors as dissenting therefrom. The appellants filed objections to entry of the findings of the jury, which was overruled, and the findings were entered and approved by the court; and, on the same day, appellant Dunphy filed notice of a motion for a new trial, on the grounds of insufficiency of the evidence; of errors in law occurring at the trial; of newly-discovered evidence, and of error in the entry of the findings of nine of the jurors, and filed affidavits in support of his motion. On April 2, 1869, the court entered a decree in accordance with the facts found by the jury, and, afterward, on hearing of the motion for a new trial, overruled the same.

Defendant Dunphy appeals from the decree and from the order overruling the motion for a new trial, and assigns several causes of error.

So far as the order overruling the motion for a new trial is concerned, it is only necessary to say, that where evidence is conflicting, the jury are to determine the facts, and their verdict will not be disturbed, unless clearly unsupported by evidence before them; no error in law occurring at the trial is specified, other than will be considered in discussing errors assigned in statement on the appeal, and the affidavits

filed, disclosing newly-discovered evidence, show that evidence to have been of a cumulative character; and, hence, we hold the court below did not err in overruling the motion.

The statement on appeal assigns nine specifications of error, but, on the hearing in this court, appellant, in his brief and argument, relies upon but three, which we will consider in order.

The first error assigned is in permitting parol evidence to be given of a writing alleged to have been executed by defendant Dunphy, the existence of which was controverted by appellants.

The question of the existence of facts constituting a foundation for the admission of secondary evidence, was one for the determination of the court under the rules of evidence, and, while the evidence was conflicting, the record seems to sustain the action of the court in permitting parol evidence of the contents of the paper to go to the jury.

The second error assigned is in admission of the declarations of defendants below, E. Morse and B. Morse, respectively, concerning the conveyance executed by them to defendant Dunphy, made in the absence of Dunphy.

The record shows that, before these statements of the Morses were admitted, evidence had been introduced tending to show complicity and collusion between Dunphy and the Morses, in respect to the conveyance in question, which was sufficient to make competent the admissions of one as against the others.

The next error assigned is in allowing the findings of but three-fourths of the jury, three dissenting therefrom, to be received and entered, and in entering the decree upon such findings.

By stipulation, the following causes, to wit: *Bray* v. *Batchelder*, *Snyder* v. *Tiernan*, and *Siegel et al.* v. *Jones & Lott*, are submitted, subject to the determination of this question, which is one of a most interesting and important character

The act of the legislative assembly of the Territory, approved December 23, 1867, known as the civil practice act, enacts that "there shall be in this Territory but one form

of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs" (section 1), and that "an issue of fact shall be tried by a jury, unless a jury trial is waived or a reference be ordered, as provided in this act." (See section 155.)

Section 15 of the act approved January 15, 1869, provides that "in all civil cases, if three-fourths of the jurors agree upon a verdict, it shall stand and have the same force and effect as if agreed upon by the whole of the jurors."

It is claimed, in all the cases under consideration in which the question is involved, that the last-mentioned act is in contravention of article VII of the amendments to the constitution of the United States, and, therefore, void.

We will first consider the question generally, and then apply the principle involved to the several cases submitted.

The article of the constitution in question reads that "in suits at common law, where the value at controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law."

We are led in the first instance to consider the nature and extent of this restriction. We believe it is admitted, and, at all events, it is too well settled to admit of question, that this article belongs to that class of limitations upon the exercise of power which were imposed by the constitution upon the federal government, and which have no application to the State governments in the exercise of those powers which were 'reserved to the States respectively, or to the people."

The restriction is general, and applies to all the departments of the general government alike, especially to the legislative and judicial branches, to whom are assigned the functions of enacting and of construing the laws, so that neither can the congress by law, nor the national courts by their rules or in their practice, deny to a citizen the right thereby secured.

The several States, by their constitutions, may otherwise

provide, although the principle is one of such ancient origin, and held by ourselves in common with the nation, from whom our jurisprudence is mainly derived, in such high estimation that, with but few exceptions, it is incorporated in the constitutions of the different States of the Union in its original form, and in many of them has been extended beyond the terms of the federal constitution and applied to trials of causes in equity, as well as at common law, and regardless of the amount in controversy.

In its application to the federal government the right of trial by jury in civil cases has been held to apply only to the class of causes specified in this article, that is, causes at *common law*, as distinguished from causes of *equity* and of *admiralty* jurisdiction, and this construction is well settled by the courts.

It remains then to determine how far this provision affects the powers of our territorial governments, and to this end we must consider its source, nature and extent. The condition of a Territory of the United States is somewhat anomalous. The extent of the powers of its local government and the rights of its inhabitants have furnished occasion not only for profound legal argument, but for great political dissension. The power of congress to legislate upon the local or domestic affairs of the people inhabiting a Territory has been strenuously denied, but at this time seems to be authoritatively established. Whether this power be derived, as claimed by some, from the constitutional right to make "all needful rules and regulations respecting the Territory or other property belonging to the United States," or be necessarily deducible, as contended by others, from the power to acquire and hold territory, it is unnecessary now to inquire.

In the exercise of this general power congress passed the act establishing and creating a temporary government for this Territory. This act distributes the powers of the local government among three departments, and ordains that the legislative power "shall extend to all rightful subjects of legislation consistent with the constitution of the United

States and the provisions of this act;" and provides that the judicial power shall be vested in certain courts, the jurisdiction of which shall be limited by law, provided that the supreme and district courts respectively shall possess chancery as well as common-law jurisdiction.

The act also provides that "the constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the Territory as elsewhere within the United States," and clothes the district courts created by it with the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested by law in the district and circuit courts of the United States.

Can the legislature or the courts thus established by law or in their practice deny the right of trial by jury in suits at common law in which the value at controversy exceeds twenty dollars?

The argument of the respondent in this case has been that, while the territorial district courts, in addition to their local jurisdiction under the territorial laws and their chancery and common-law powers, are also vested with federal jurisdiction, they yet are not national or federal courts, as established and contemplated by the constitution, and hence that the constitutional restriction we are considering does not apply to trials of causes in such courts.

On the other hand, it is urged by the appellant that the organic act performs the functions of a State constitution, and that under its express terms all the general provisions of the federal constitution apply to the territorial government.

It is certainly true that the territorial district courts are not federal courts, as contemplated by the constitution. They are created by congressional enactment in the exercise of the power to govern territory of the United States, and must necessarily be restricted in their powers and jurisdiction to the limit of the power which created them. What that limit is we will consider hereafter.

It will be, perhaps, a digression to discuss the nature and

extent of the powers vested in the district courts by the organic act, but, as a subject which has attracted general interest and germane to the question before us, we will briefly refer to it.

The district court sits in two distinct capacities, as a local tribunal, and also exercising the jurisdiction of a federal court.

As a local tribunal, its practice and course of procedure, provided its common law and chancery jurisdiction be not impaired, may be regulated by the local laws, which, however, must not infringe any principle of the constitution or any act of congress applicable to it, and we take occasion, although the question is not raised in the record of any of the causes now under consideration, to suggest to the legislative assembly, as well as to the legal profession of the Territory, whether the civil practice act now in force, or the construction heretofore placed upon it, in so far as it permits legal and equitable claims or defenses to be united, be not erroneous. The supreme court of the United States, in *Thompson* v. *Railroad Companies*, 6 Wall. Rep., hold that "the constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law and in equity, as distinguished and defined in that country from which we derive our knowledge of these principles." "And, although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet, the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."

If it be true, as held, that the constitution and the acts of congress recognize and establish the distinction between law and equity, can the legislative assembly of the Territory, under the organic act, abolish that distinction in the territorial district courts, even while sitting as local tribunals? As federal courts, the district courts are understood to be governed, in all cases *at common law*, by the local

rules of decision and of practice, where the constitution or statutes of the United States do not otherwise provide; while in *causes in equity* the proceedings must conform to the rules governing causes in equity, notwithstanding the legislative assembly have, by statute, abolished the distinction between forms of proceeding at law and in equity, and have established but one form and course of proceeding in all civil actions. But to return:

The right of jury trial, secured by the article of the constitution under consideration, referring not only to trials in the national courts established by the constitution, and the territorial district courts, at least while in the exercise merely of their local jurisdiction, not being embraced under its provisions, it is urged that the court below did not err in receiving the findings and rendering the decree in the principal cause now under consideration. This proposition assumes that the cause is one at common law, and for the present we will so assume. This position could only be maintained by holding that, while the constitutional restriction applied to the federal judiciary, it did not extend to the legislative power intended to be restricted. We have already stated that it was designed to restrict all the departments of the federal government, legislative as well as judicial. If, then, it is restrictive upon congress as well as upon the federal courts, can congress, in the exercise of its power to govern a Territory, create a local legislature or local courts, and delegate to either a power which it does not itself possess, to deny the right in question? We think clearly it cannot.

Even without the provision in the organic act, that the constitution and laws not locally inapplicable shall have the same force and effect in the Territory as elsewhere within the United States, the conclusion would be the same.

Congress has no power, either directly or by a delegation of power to another body of its own creation, to deny to a citizen of a territory the right to a trial by jury in a suit at common law, where the value at controversy exceeds $20.

It is further contended, however, that inasmuch as the act

of the legislative assembly requires the same number of jurors as the common law, it is not an infraction of the constitution.

This position is not tenable.

"Trial by jury," as the words are used in the constitution, had, at the time of its adoption, a fixed legal signification, and from time immemorial has meant a trial by a tribunal of twelve men, acting only upon a unanimous determination. The origin of this mode of trial is lost in the dimness of the past, but from the earliest period down to the time of the adoption of the constitution, unanimity of twelve jurors alone has constituted a legal verdict. If the legislative assembly could dispense with one attribute or essential of a verdict, it could as well destroy the other, or repeal the right altogether. It can do neither; and, hence, the act in question is, in so far as it applies to actions at common law in which the value at controversy exceeds $20, unconstitutional and void.

The causes before mentioned of *Bray* v. *Batchelder*, *Snyder* v. *Tiernan*, and *Siegel et al.* v. *Jones & Lott*, are all common law causes, and embraced within the foregoing principle, and the judgments in them must be reversed, and the causes remanded for new trial.

The cause at bar (*Kleinschmidt* v. *Dunphy et al.*), however, is clearly one of chancery jurisdiction, and it remains now to consider the statute in reference to trials of causes in equity.

The right of jury trial is not secured by the constitution in causes of equity jurisdiction, and in the absence of statutory enactment, federal or territorial, it does not exist. In such cases the chancellor might, according to the established rules of chancery practice, call a jury to his aid, to determine questions of fact arising upon the hearing. Such verdict, however, would be merely advisory, and addressed solely to the conscience of the chancellor, who might wholly disregard it.

We have seen that the civil practice act has provided the same manner of disposing of issues of fact in all civil cases,

whether in law or in equity. It follows, from what we have said, that the legislative assembly has the same power as congress, within the limitations of the grant of power to it contained in the acts of congress and the constitution.

Could congress confer the right of trial by jury of issues of fact in causes in equity in the federal courts? and could congress by law dispense, in such causes, with the requisites of a common-law jury, either in respect to number or unanimity?

We think it could. We find nothing in the constitution preventing the exercise of such power. Hence, we conclude that the legislative assembly also possesses the power, under the organic act, as being a subject of rightful legislation, and contravening no provision of the constitution or of the acts of congress. This power they have exercised, and it is the province of the judiciary to construe, and not to make laws, and, in construing, to give effect to them so far as it may be done. We conclude, then, that the act in question, so far as it relates to trial of issues of fact in causes in equity, is constitutional and valid.

The other errors assigned in the statement on appeal in this case were not urged in the briefs or arguments in this court, and we will only notice the refusal of the court to give the instructions asked by both parties.

The court submitted to the jury only specific questions of fact, and gave all the instructions necessary in regard to the questions submitted, as no general verdict was required.

On examination of the whole record we find no error sufficient to warrant a new trial.

The decree of the court below is affirmed, with costs.

KNOWLES, J., and SYMES, J., concurred.

Exceptions overruled.

This cause was taken by appeal to the supreme court of the United States, and the decree of the district court was reversed. 11 Wall. 610.

BAUTZ et al., appellants, *v.* KUHWORTH, respondent.

AGREEMENT FOR BUYING LAND—*how rescinded—purchase-money.* Neither the vendor nor vendee can rescind a written agreement for the purchase of land, if the buildings thereon, which were not the chief inducement to such purchase, are destroyed by fire, without any fault of the vendor. The vendee cannot recover the portion of the purchase-money which he paid the vendor on this agreement before the fire occurred.

Appeal from the Third District, Lewis and Clarke County.

BAUTZ AND HORSKEY commenced this action to recover $1,000, money had and received on an agreement. The court, WARREN, J., sustained Kuhworth's demurrer to the complaint and rendered judgment for defendant. The plaintiffs appealed.

The facts appear in the opinion.

CHUMASERO & CHADWICK, for appellants.

The complaint states facts sufficient to constitute a cause of action, and the court erred in sustaining the demurrer thereto. Hilliard on Vendors, 73 *et seq.*; Sto. on Sales, §§ 423, 424, 448; 1 Sto. Eq., §§ 101, 102; Bouv. L. D. 465.

SHOBER & LOWRY, for respondent.

Appellants by the contract had the privilege of paying $5,500 May 3, 1869, and take the deed, or refusing to pay said sum and let the $1,000 go as stipulated damages. The appellants chose the latter and cannot recover what they have paid for the privilege of doing what they have done in the premises. The court below properly sustained the demurrer. *Dakin* v. *Williams*, 11 Wend. 67; *Lester* v. *Jewell*, 1 Kern. 453; 2 Pars. on Cont. 232, 233; *Guzley* v. *Price*, 16 Johns. 267.

KNOWLES, J. The complaint in this cause presents the following facts as constituting plaintiffs' cause of action:

Appellants made an agreement with respondent on the 5th day of April, 1869, for the purchase of a certain lot,

together with the appurtenances thereto belonging, situate in the town of Helena.

In accordance with that agreement appellants paid respondent $1,000, and executed and delivered to J. H. Shober to be held as an escrow two promissory notes secured by a mortgage upon the premises for the sum of $6,500. Respondent made and executed a deed to said premises to appellants and delivered the same to the said Shober to be held as in escrow. The whole agreement was to be consummated on the 3d day of May, 1869. At that time appellants were to pay respondent $5,500 in addition to the $1,000 already paid. The deed was to be delivered to them, the mortgage and notes to be delivered to respondent. If the appellants failed to comply with their portion of the agreement they were to forfeit to respondent the $1,000 already paid, as liquidated damages. That appellants were to hold possession of the premises from the said 5th day of April until the said 3d day of May. Appellants were on the said 3d day of May willing and ready to pay the respondent the sum of $5,500, and in all respects to comply with the terms of their agreement. The buildings on said premises were worth the sum of $6,500. Respondent was unable to comply with his portion of the agreement, for the reason that on the 28th day of April these buildings were destroyed by fire, and respondent was unable to deliver the premises as they were on the day of agreement. Appellants claim judgment for the $1,000 paid respondent.

The respondent filed a general demurrer to the complaint, setting forth that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer. The appellants appeal to this court, assigning as error this ruling of the court below.

The question presented in this case is, could the appellants, when it became impossible for the respondent, without any fault of his, to deliver the premises with all the buildings thereon, as they were at the time of the agreement to them on the 5th day of May, rescind the agreement?

There is no allegation that the respondent could not con-

vey to them a good and valid title to the lot. There is none that the buildings were the chief inducement to the agreement, and a prayer that the contract be rescinded for that reason. The appellants seem to have considered that the destruction of these buildings entitled them to rescind the contract.

If the buildings had been damaged without the fault of respondent, to the extent of $5, so that he could not have delivered the premises to appellants in the same condition they were at the date of the agreement, in principle the same reasons would exist for rescinding the agreement as exists in this case. If any other rule prevailed, the right to rescind an agreement would depend upon the amount of damages done the premises bargained for, and it would devolve upon the court to decide when a sufficient amount of damages had been done, premises bargained for, to warrant a contracting party to rescind the agreement. We have been unable to find any authority, and do not believe that any exists, to the effect that where an appurtenance to real estate, which was not the chief inducement to the purchase of the same, has been damaged, or even destroyed, without any fault of the vendor, so that he could not deliver the premises on the day they were to be delivered to the vendee in the same condition they were on the day the agreement was made, the vendee would have the right to rescind the agreement altogether.

Believing that such is not the law, we find no error in the ruling of the court below.

It is true, if the premises were respondent's at the time of the fire, the loss of the buildings would be his, and the appellants might have their value deducted from the amount they were to pay him for the premises; or, if the buildings were the chief inducement for the purchase of the premises, perhaps a court of equity would, for this reason, order the agreement rescinded and canceled. But to allow a vendee to rescind an agreement for the purchase of real estate, for a damage to an appurtenance thereto, without any fault of the vendor, which could be compen-

sated for in money, would be going farther than we think we would be warranted. For the same reason we see no reason why the vendor might not rescind the agreement. He is without fault, and the obligations of an agreement are mutual; hence, if one could rescind, why not the other. Yet who doubts that the vendees in this case might have maintained an action for a specific performance of this agreement, had they performed, or offered to perform, their part of the agreement, and could have had the value of the building deducted from the amount to be paid for the premises.

These being the views of the court in this case, the judgment of the court below is affirmed.

Exceptions overruled.

GRANT, respondent, *v.* SPENCER et al., appellants.

STATUTORY CONSTRUCTION — *act relating to grounds for refusing new trial is directory.* Section 196 of the civil practice act, requiring the court to state in writing the grounds on which a new trial is refused, is directory. The failure of the court to state such grounds in this case did not injure the appellants.

PROMISSORY NOTE — *notice of non-payment not waived by presence of indorser.* The presence of one of the indorsers of a note, when the holder presents it to the maker at maturity for payment, does not waive a regular notice of its non-payment to the indorsers.

Appeal from the First District, Madison County.

ON April 28, 1868, Grant commenced this action in the district court against three defendants, on the following instrument:

"$700 Gold.

VIRGINIA CITY, M. T., *October* 1, 1867.

On the 1st day of March, 1868, for value received, I promise to pay Spencer, Harrison & Co., or order, the sum of $700 in good gold dust or United States currency, at cur

rent rates, with interest from date until paid, at the rate of five (5) per cent per month.

J. B. CHAPIN."

[Stamp.]

Indorsements:

"We hereby transfer the within note to J. M. Grant, Virginia City, M. T., December 7, 1867.

SPENCER, HARRISON & CO."

The payments indorsed thereon amounted to $392.50.

A jury trial was waived and the case was tried by the court, HOSMER, J., in June, 1868, and judgment was rendered for plaintiff for $698, which was to bear interest at the rate of 5 per cent per month until paid. The defendant's motion for a new trial was not heard until May, 1869, when the court, WARREN, J., overruled the same, without stating in writing the grounds therefor, and defendants appealed.

The statute of Montana, relating to indorsers on promissory notes, is as follows:

"Indorsers of * * * promissory notes shall be contingently liable only, until after they shall have been notified of the presentation and non-payment thereof, at maturity, by the person or persons primarily liable for their payment."

"In order to make the contingent liability of any indorser of any * * * promissory note absolute, it shall be necessary for the holders of the paper to cause it to be presented at the place where, by its terms, it is payable, if any place of payment be therein or thereon specified, and if no place of payment be specified, then to the person himself who is primarily liable for the payment; and, if payment thereof, on such presentation at maturity, be neglected or refused, to cause a written or printed, or partly written and partly printed, notice of such presentation, demand and non-payment, briefly describing the * * * note, to be served immediately thereafter upon the indorser, unless the same shall be protested in the usual manner by a notary public; in which case the official certificate of protest of such officer, made on the day

of protest, inclosed in letter form, and deposited, post-paid, in the post-office, directed to such indorser at his usual place of residence, will charge him in the same manner."

During the argument of the case, the respondent remitted all interest on the judgment, in excess of ten per centum per annum.

The other facts are stated in the opinion.

H. N. BLAKE, for appellants.

The court should have stated in writing the grounds on which the new trial was refused. Civ. Pr. Act, 1867, § 196.

The statement shows the following facts: That no false representations were made to respondent by appellants concerning the note; that respondent neglected to collect the same from the maker, because he was obtaining five per cent per month interest; that respondent bought the note on his own judgment, and that the note was not protested until two months after maturity.

The pleadings of the parties treat the instrument sued on as a negotiable promissory note. Complaint and answer.

The appellants were indorsers upon the note and entitled to notice of the presentation and non-payment thereof at maturity by the maker. Acts 1865, 343, §§ 5, 6.

The instrument sued on possesses all the elements of a negotiable promissory note. The amount to be paid on the note is fixed in it, and also by the statute. 1 Pars. on Notes & Bills, 30, ch. 3; Acts 1865, 338, § 1.

The rate of interest on the judgment should be ten per centum per annum. *Griffith* v. *Hershfield*, *ante*, 66.

DAVIS & THOROUGHMAN, for respondent.

No brief on file.

SYMES, J. This was an action on a promissory note—holder against indorsers—tried at the Madison county district court in June, 1868, before the court, and judgment given for plaintiff for amount due on note. Motion for new trial overruled, and case brought up on statement for new trial and order overruling same.

The complaint alleges that one Chapin, on the 1st of October, 1867, executed to the defendants his promissory note, due the 1st of March, 1868, for $700 in gold, with interest at five per cent per month until paid. That on the 7th of October, 1867, defendants indorsed said note to plaintiff; that plaintiff presented said note when due to said Chapin, and he paid $207.50 on same, but failed to pay more at that time, and that defendants had notice thereof; that on the 9th and 29th days of March, plaintiff called on said Chapin and demanded payment of said note, and on the 9th Chapin paid $100, and on the 29th, $85, but has since failed to pay balance due: that plaintiff protested note, and gave notice to defendants.

The answer admits indorsement of note; denies payment was refused, and states that when plaintiff presented note, Chapin asked plaintiff how much money he needed, and plaintiff said $200 would do him, and Chapin paid him $207.50; that on the 9th of April plaintiff called again, and received $100; and, on the 29th, called with defendant Spencer, and demanded payment, and received $85; deny notice of refusal to pay, and allege that they asked plaintiff several times if he had collected note, and he replied that he did not want the money, and it was drawing five per cent a month; deny owing plaintiff any sum, and ask judgment for costs.

The evidence in statement for new trial shows that note was indorsed by defendants; that when note became due, defendant Spencer went with and introduced plaintiff to maker of note, to demand payment of same, which he did; that Chapin did not refuse to pay note, but asked plaintiff how much money he wanted: plaintiff replied $200 would do him, and Chapin paid him $207.50; that on the 9th of April, '68, he called again and received $100—all he demanded—and that on the 29th he called with defendant Spencer, and demanded payment: Chapin replied he was a little hard up, and asked plaintiff how much money would do him then: plaintiff said $85 would answer, but he must have balance soon: Chapin paid him $85. Two

witnesses testified that plaintiff said he did not want to draw money on note, for it was drawing five per cent a month, and he considered Chapin good as the bank. Note was not protested until two months after due, and three payments had been made on same, and no notice given of non-payment, except two months after due. Plaintiff testified and did not contradict foregoing statement of evidence as to protest, notice, etc.

The errors assigned on denying motion for new trial are. 1. That the court erred in not stating grounds for refusing new trial in writing; 2. In finding, from the facts, that plaintiff was entitled to recover, and that defendants were liable as indorsers; 3. In finding that plaintiff was entitled to five per cent per month on judgment.

Section 196, Civil Code, which provides that the court or judge shall state in writing the grounds upon which a new trial is granted or refused, is directory, and it is not seen how the appellants were prejudiced by the grounds not being specially stated in writing. This case was tried by the court, and the question is, does the evidence or facts contained in the statement for new trial support the findings of court, that the plaintiff was entitled to recover against the defendants the amount due on the note as indorsers thereof. It was admitted that the writing in this case is a negotiable promissory note. To hold an indorser the note must be presented to maker at maturity and payment demanded, and if neglected or refused, notice given within reasonable time to indorser. The note in this case was presented at maturity by the holder, in the presence of one of the indorsers, to the maker for payment, who did not refuse to pay, but asked holder how much money he wanted; he said $200 would do him, and maker paid him $207.50. Some time after holder again presented note for payment and received $100 on same, and again (on 29th of April) presented note in presence of indorser and received $85 on same, the amount he said would do him at the time, but he must have balance in short time. There was no protest or notice under two months after note became due to indorser that payment

had been refused, or that holder looked to indorsers for payment; but proof that holder told indorsers and others, after presentment and receiving $207.50, that he did not want to collect the money as it was drawing five per cent a month and maker was good as bank. Then if there was no regular notice, was the presence of the indorser, when demand was made, constructive notice, or such knowledge as would excuse notice, or any waiver of same? We think not. "Knowledge in fact is no excuse for regular notice." 1 Pars. on Bills & Notes, 521. And where the drawer of a bill undertook to present it after maturity, although attempts had been made by indorser to procure payment, it was held no waiver of notice. Pars. on Bills & Notes, 521. The expression in a conversation that note would be paid was held not sufficient to prove waiver of notice, or promise to pay or see it paid. 17 Pick. 332. There is in the statement no evidence to prove that there was notice or protest under two months, or that there was any waiver or promise to pay by indorsers; and the court erred in finding the defendants responsible as indorsers and in overruling motion for new trial. Whether verbal notice is good under our statute may be questionable, but the point is not raised in this case. The third error assigned is the finding that plaintiff was entitled to five per cent per month interest on judgment. It has been decided in this court (but I believe since the rendition of this judgment) that a judgment could draw but ten per cent. But plaintiff appeared in this court and remitted all over ten per cent, which would have prevented defendants from being prejudiced thereby.

Judgment reversed and new trial ordered.

Exceptions sustained.

McGREGOR, Assignee, respondent *v.* WELLS, FARGO & Co., appellants.

SHERIFF'S RETURN — *cannot be quashed by a motion.* The sheriff's return on an execution cannot be quashed by a motion and evidence of its illegality or falsehood.

SHERIFF'S RETURN — *remedy of injured party.* The party, who is injured by a sheriff's return upon an execution, can maintain an action for damages against the officer.

SHERIFF'S RETURN ANNULLED BY COURT — *payment of execution.* The court can annul the sheriff's return upon an execution, which shows that he has applied one execution in payment of another in his hands.

EXECUTION ISSUED FOR ASSIGNEE OF JUDGMENT — *collection of.* The court can direct an execution to be issued in favor of the assignee of a judgment, on motion and proof of its assignment, but it cannot order the officer to collect an execution in a particular manner.

Appeal from the Third District, Lewis and Clarke County.

J. M. CLARKSON recovered a judgment for $5,000 against Wells, Fargo & Co., in the district court in and for Lewis and Clarke county, in July, 1868. In December, 1867, Wells, Fargo & Co. brought an action in the same court against Clarkson, Norman & Drake, partners, and doing business under the style of Drake, Clarkson & Co., to recover a partnership debt. At the trial in October, 1868, the plaintiffs dismissed the case as to Norman and Drake, and recovered judgment against Clarkson for $2,673.38. On December 14, 1868, an execution was issued in favor of Clarkson, against Wells, Fargo & Co., and placed in the hands of the sheriff. On the same day, an execution was issued in favor of Wells, Fargo & Co., against Clarkson, and placed in the hands of the sheriff. On the first execution, the officer made the following return:

"Having an execution in my hands bearing even date herewith, in favor of Wells, Fargo & Co., against John M. Clarkson, on a judgment in the district court of the third judicial district of the Territory of Montana, in and for Lewis and Clarke county, for the sum of $2,673.38, dated October 26, 1868, the amount of their execution, and the

interest thereon, amounting to $2,544.50, is applied as an offset to the execution first above mentioned, and this execution is returned satisfied, and the proceeds applied as aforesaid

W. K. ROBERTS, *Sheriff*."

December 14, 1868.

The officer made a return of the same character upon the execution in favor of Wells, Fargo & Co.

On motion of McGregor, the assignee of one-half of the judgment in favor of Clarkson, the court, KNOWLES, J., canceled the return of the sheriff on the first execution, and ordered that an execution should be issued in favor of McGregor, and placed in the hands of the sheriff; and that the sheriff "execute said process of execution by using all lawful means to collect the balance due of said judgment, with the whole amount of the costs now due in said cause, and pay the same over to the said A. McGregor, in the manner provided by law."

To this order, Wells, Fargo & Co. excepted.

The opinion contains the other facts.

WOOLFOLK & TOOLE, for appellants.

The judgment assigned to McGregor was subject to all offsets existing at the time of, or before notice of the assignment. Civ. Pr. Act, § 5; *McCabe* v. *Grey*, 20 Cal. 515.

The filing of the assignment with the clerk of the district court was not constructive notice under the laws of Montana. *Call* v. *Hastings*, 3 Cal. 179; Acts 1865, 483, §§ 23, 24, 25; 2 Bouv. L. D., tit. "to record." It was no part of the records.

The execution upon Clarkson's judgment was the proper subject of set-off to the execution of Wells, Fargo & Co., against him, unless McGregor could show that appellants had actual notice of the assignment of Clarkson to him, prior to the date of their judgment against Clarkson. If no execution had been issued, it would have been the duty of the court to set off the executions against each other upon motion. *Porter* v. *Lisser*, 22 Cal. 136; 5 Abb. Dig. 16,

§ 186, *et seq.; Chamberlin* v. *Day*, 3 Cow. 353; *Utica Ins. Co.* v. *Power*, 3 Paige, 365.

The court refused to consider evidence showing that appellants had no notice of the assignment to McGregor, and ordered an execution in favor of McGregor to be issued, and thereby deprived appellants of their offset.

The assignee should have applied to the court to be substituted in the action, which was not done. Civ. Prac. Act, § 16.

No indorsement was made on the execution in favor of Clarkson, that it had been assigned to McGregor. The sheriff had a right to set off one execution against the other Waterman on Set-offs, 412, 413, 414.

The sheriff's return on the executions satisfies both judgments. The order of the court opens up one judgment, and leaves the other satisfied. If respondent has any remedy, it is against the officer. The return could not be set aside by motion and affidavits. The remedy was by bill in equity. *Egery* v. *Buchanan*, 5 Cal. 53.

There was no error in the clerk issuing the execution in the name of Clarkson instead of respondent. He could not do otherwise without an order of court. Civ. Prac. Act, § 16.

Chumasero & Chadwick, for respondent.

Respondent took one-half of the judgment assigned to him, without any right of set-off of the judgment subsequently recovered by appellants against Clarkson. *Porter* v. *Leach*, 13 Metc. 482; *Makepeace* v. *Coates*, 8 Mass. 451; Waterman on Set-off, 391; *Baker* v. *Hoag*, 6 How. Pr. 201; 5 Abb. Dig. 16, §§ 188, 189, 202, 208; 10 U. S. Dig. 391, § 13.

The question of notice does not arise in this case, as the appellants did not suffer on account of no actual notice being given. *Graves* v. *Woodbury*, 4 Hill, 559.

The appellants had legal constructive notice of the assignment to respondent. Civ. Prac. Act. §§ 204, 205, 206.

Symes, J. This was an appeal from an order made by the court below, annulling and setting aside the return of

the sheriff to an execution in the case, and ordering an execution to issue in favor of the assignee of the judgment.

Plaintiff, Clarkson, recovered a judgment for $5,000 against defendants, Wells, Fargo & Co., on the 18th day of July, 1868, and, on the same day, said plaintiff assigned one-half of said judgment to Archibald McGregor, by an assignment in writing, and filed same with the clerk of the court. And on the 14th of December, 1868, an execution was issued on said judgment for balance due thereon — $2,517.03, and interest — and delivered to the sheriff for collection. On the 15th of February, 1869, the sheriff made a return on said execution to the effect that, having an execution in his hands in favor of defendants, Wells, Fargo & Co., and against the plaintiff in said aforementioned execution, on a judgment in the same court for $2,673.38, that he applied the amount due on said first execution as a set-off on the last-mentioned execution, and returned the same satisfied. Afterward the said McGregor moved the court to annul and set aside the return of the sheriff to the execution, and to order an execution to issue in favor of him, for so much of the judgment as had been assigned to him (the balance being paid). The court sustained the motion, to which defendants excepted.

The only question presented is, did the court below err in sustaining the motion to quash the return of the sheriff to the execution, and directing an alias execution to issue in favor of the assignee of the judgment. This depends, first, whether sufficient appeared on the face of the judgment roll, and the execution returned to the court, to justify the court in quashing and annulling the return; and, second, whether the assignment of the judgment, from Clarkson to McGregor, justified the court in directing an execution to issue in favor of the assignee.

The court could not quash or annul the return of the execution, on motion, on evidence *aliunde* of irregularity, falsehood or illegality in the conduct of the sheriff. This can only be reached by action against the sheriff for a false return, and damages resulting therefrom.

The transcript on appeal contains the judgment in favor of Clarkson against Wells, Fargo & Co., the assignment to McGregor, the execution and return of the sheriff, and the order of court and exception to same. The judgment and execution are regular and formal; and there being no statute in this Territory authorizing the sheriff to set off one execution in his hands in favor of another, or to apply one execution in payment of another; and the return on its face showing the sheriff had done this, the court committed no error in annulling and setting aside the return. A court has full power over its own process for the enforcement of its orders and judgments.

The written assignment appears to transfer the one-half interest in the judgment from Clarkson to McGregor. No point is made that it is insufficient for that purpose. Section 16 of our Civil Code provides, that in case of a transfer of interest in an action, it may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted.

This authorized the court to allow or direct an execution to issue in favor of the assignee McGregor, upon motion and proof of the assignment of the judgment; and there was no error in the court sustaining that part of the motion. The counsel for appellants attach to the transcript herein the record of a suit in which judgment was rendered in favor of Wells, Fargo & Co., against plaintiff Clarkson and others; and their bill of exceptions shows that they offered, in defending the motion, to prove by affidavits that the indebtedness, on which their judgment was rendered, was purchased before they had any notice of the assignment from Clarkson to McGregor; and they file a long brief, and cite numerous authorities, to show that the assignment to McGregor was subject to all set-offs and equities existing at the time of, or before notice of, assignment, and that the sheriff had the legal power to set off the executions. It is immaterial in this case, whether or not the facts assumed, or positions taken by appellants, are correct: they could not be inquired into, on the motion to annul the return for

errors and irregularities appearing on the face of the papers. The record of the case accompanying the transcript shows that the judgment in the case on which the sheriff set off the execution was not against Clarkson individually, but against him and other persons, so that the court could not have set off the judgments on motion, but it could only be done by suit in equity, showing insolvency of Clarkson, etc. The doctrine that a sheriff, under the common law, without any statute authorizing it, cannot set off executions, is too well settled to need discussion. Many questions were raised and argued which would affect the rights of the parties in a suit in equity, but have no bearing on a motion to annul return of sheriff on face of papers.

The court, in directing an execution to issue, ordered the sheriff to proceed and make the money, levy on property of the defendants, sell the same, and pay the money to assignees. The presumption is that officers will do their duty, and proceed according to law; and it was erroneous to order particularly that the sheriff should proceed to collect the execution, and the manner in which he should do so, but not such as will reverse the order.

The order of the court below is affirmed.

Exceptions overruled.

This cause was taken by appeal to the supreme court of the United States, and the appeal was dismissed at the December term, 1871. 13 Wall. (U. S.) 188.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1870, HELD IN VIRGINIA CITY.

Present:

HON. HENRY L. WARREN, CHIEF JUSTICE.
HON. HIRAM KNOWLES, ASSOCIATE JUSTICE.

TRAVIS et al., respondents, *v.* MCCORMICK, appellant.

MORTGAGEE LOSES LIEN ON PERSONAL PROPERTY AFTER DEBT MATURES. A mortgagee of personal property loses his lien thereon, as against a purchaser in good faith from the mortgagor in possession, after the maturity of the mortgage debt, although the mortgage is good and valid for one year after it is recorded.

LACHES OF MORTGAGEE INVALIDATES HIS LIEN. In this case, the unexplained failure of the mortgagees to take possession of property, or foreclose their mortgage, two months after the maturity of their debt, was laches, and invalidated their lien, as against a purchaser in good faith.

DUTY OF MORTGAGEES. The mortgagees of personal property should take immediate possession of the same after the maturity of their debt, or endeavor so to do with sufficient diligence.

Appeal from the Third District, Lewis and Clarke County.

IN August, 1869, W. S. and C. M. Travis commenced this action to obtain the possession of a "red roan" horse. The court, SYMES, J., sustained the plaintiff's demurrer to the answer, and defendant appealed.

The pleadings and facts appear in the opinion.

The statute of the Territory, concerning chattel mortgages, which is referred to in the opinion, is as follows:

"SECTION 1. No mortgage on goods, chattels or personal property shall be valid as against the rights and interest of any third person, unless possession of such personal property shall be delivered to remain with the mortgagee, or the said mortgage acknowledged and recorded as hereinafter directed."

"SEC. 3. Any mortgage of goods, chattels or personal property so acknowledged shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the same is made, acknowledged or recorded, and shall thereupon, if *bona fide*, be good and valid from the time it is so recorded, for a space of time not exceeding one year, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor. Provided, that such conveyance shall provide for the property so to remain with the mortgagor."

CHUMASERO & CHADWICK, for appellant.

The demurrer should have been overruled. The mortgage was fraudulent as to the appellant in this, that the time for the taking of possession of the mortgaged property had long elapsed, at the time of the purchase thereof by appellant, and that his title thereto had thereby become perfect. Acts 1865, 339, § 3; Hilliard on Sales, 126; Acts 1865, 494, § 15; *Reed* v. *Eames*, 19 Ill. 594; *Constant* v. *Matteson*, 22 id. 546; *Cass* v. *Perkins*, 23 id. 382; *Funk* v. *Staats*, 24 id. 633; *Wooley* v. *Fry*, 30 id. 58.

W. F. SANDERS and J. J. WILLIAMS, for respondents.

A mortgage imports *prima facie* that vendor may keep possession till breach of condition, and his continued possession is no badge of fraud, and raises no presumption thereof. Hilliard on Sales, 126; *Fletcher* v. *Willard*, 14 Pick. 464.

The necessity of a record or delivery to the mortgagee is a creature of the statute. At common law, neither is required to render the mortgage valid against *bona fide* purchasers or attacking creditors. 1 Pars. on Cont. 570.

This mortgage is valid under the statute. Acts 1865, 339, § 1. The answer does not attack the acknowledgment or record of the mortgage. In these respects the answer is defective, and the demurrer was properly sustained. The mortgage provides for the property to remain with the mortgagor, and is good for one year. The act does not say that the mortgage shall be good for such length of time as it provides that the property may remain with the mortgagor. Acts 1865, 339, § 3.

The rest of the act has nothing to do with the validity of mortgages. What does the statute require? Section 1, not 3, tells what mortgages are invalid. The delivery was not had in this case. The complaint brings the respondents under the other alternative, which is not attacked by the answer. Non-delivery after May 1, 1869, is the ground of the defense. Wherefore, the answer is bad. Voorhies' Code, 537, note *a*; 7 Abb. N. Y. Dig. 123, §§ 11, 12.

WARREN, C. J. The complaint in this cause alleges that W. S. Hamilton and T. P. Ames executed their promissory note in favor of plaintiffs below, bearing date December 31, 1868, and payable May 1, 1869; and that, for the purpose of securing payment of the same, William Hamilton, T. P. Ames and J. A. Ames executed a chattel mortgage of the same date, which was duly acknowledged, and was filed for record and recorded in the recorder's office of Lewis and Clarke county, on January 1, 1869. That the defendant below about April 25, 1869, obtained possession of the mortgaged property, and that the plaintiffs, on July 20, 1869, and before commencement of this suit, demanded of him possession of the same, which was refused.

The answer admits the execution of the note and mortgage, as set forth in the complaint, and avers that by the terms of the mortgage it was provided that the property

should remain in the possession of the mortgagors until the maturity of the note; that the mortgagors were permitted by the mortgagees, the plaintiffs below, to remain, and did in fact remain in possession of the property long after maturity of the note, and until July 1, 1869, at which date the defendant below in good faith purchased the mortgaged property of the mortgagors for a valuable consideration.

To this answer the plaintiffs demurred for insufficiency, which demurrer was sustained by the court below, and thereupon judgment was entered for plaintiffs, from which judgment the defendant appeals.

The demurrer admits the facts stated in the answer, and the only question raised relates to the construction to be given to the act of the legislative assembly concerning chattel mortgages, approved December 31, 1864. The appellees claim that the mortgage in question having been executed, acknowledged and recorded in compliance with that act, and providing by its terms that the possession of the property might remain with the mortgagors, under the act in question, was valid as against third persons for the period of one year from the time of record, without reference to the time of maturity of the mortgage debt, or to the provision contained in the instrument in regard to possession of the property. This is not the proper construction of the act. The parties themselves fixed the period by the terms of the mortgage, during which the mortgagors might retain possession of the mortgaged property, and it became the duty of the mortgagees to take immediate possession of the property, or endeavor so to do, at the expiration of the period limited, with all due promptitude and diligence. By a failure in so doing they lost their lien as against a purchaser in good faith from the mortgagors in possession.

What constitutes sufficient diligence is a mixed question of law and fact, and must depend upon the particular circumstances of each case, but in this instance the unexplained failure of the mortgagees to take possession of the property or to foreclose their mortgage for two months after

maturity of their debt, as averred in the answer, we hold to be such laches, amounting to fraud, as to invalidate their lien as against the appellant.

The court below erred in sustaining the demurrer to the answer, and in rendering judgment for the plaintiffs below.

The judgment is reversed and the cause remanded.

Exceptions sustained.

KNOWLES, J., concurred.

At the trial of this action in December, 1869, the plaintiffs obtained judgment and the defendant appealed to this court. See p. 347.

LOEB et al., appellants, *v.* KAMAK et al., respondents

PLEADING — *amount of damages in complaint not material.* The amount of damages claimed in a complaint is not a material averment under the civil practice act of this Territory. The plaintiff can recover the damages he proves.

DAMAGES — *profits on resale of goods too remote.* The profits which might have been made by the resale of goods are too remote to sustain an action for specific damages.

Appeal from Third District, Lewis and Clarke County.

LOEB and another brought this action to recover $3,000 as damages, and obtained a verdict for $700. The plaintiffs then moved for a judgment for $3,000 *non obstante veredicto.* The motion was overruled by the court, SYMES, J., and the plaintiffs appealed.

The opinion contains the facts.

CHUMASERO & CHADWICK, for appellants.

The complaint alleged fraud on the part of respondents, and damages in the sum of $3,000. The answer denied fraud, but did not deny the allegations of the complaint as to the damages. On the issue of fraud, the jury found for

the appellants and assessed their damages at $700. No evidence on behalf of appellants or respondents as to amount of damages was introduced. After the rendition of the verdict and before the entry of judgment, the appellants moved for judgment for $3,000, *non obstante veredicto*, on the following ground: That, as the issue of fraud was for the appellants, and there was no denial in the answer of the amount of damages, the assessment of the same for less than the amount averred, or at all, was surplusage, and the court should have entered judgment for $3,000. Civ. Prac. Act, §§ 65, 66; *Toulumne R. R. Co.* v. *Patterson*, 18 Cal. 415; *Patterson* v. *Ely*, 19 id. 29; *Dimick* v. *Campbell*, 31 id. 240.

LAWRENCE & HEDGES, for respondents.
No brief on file.

KNOWLES, J. The facts presented in the record of this case are as follows: The appellants purchased of the respondents a certain stock of goods. The appellants allege, in their complaint, that the respondents made false and fraudulent representations as to what said stock of goods consisted of, in this: That they represented that there was in said stock three hundred and fifty beaver cloth suits of clothing, and that the said stock of goods, in fact, contained but fifty-nine of said beaver cloth suits; that appellants, relying upon these representations of respondents, purchased said stock of goods; that respondents have failed to deliver said whole number of beaver suits; that appellants have been deprived of said goods, and of the profits which they might have made by the re-sale of the same, whereby appellants have been damaged in the sum of $3,000. The complaint makes out a case for damages for false and fraudulent representations, as to the contents of a stock of goods.

The respondents, in their answer, deny the false and fraudulent representations, but fail to deny the amount of damages claimed by appellants in their complaint.

The cause was tried by a jury, who returned a verdict for appellants, and assessed their damages at $700.

The attorneys for the appellants moved for a judgment for the sum of $3,000, in accordance with the uncontroverted allegation in the complaint, claiming damages in that sum.

It is contended, by the appellants, that the only issues presented in the case were, whether the respondents had made these false and fraudulent representations, and the appellants purchased the goods upon such representations; that the amount of damages was admitted by the record, and, hence, not a subject for the consideration of a jury; that the allegation claiming the amount of damages was a material averment in the complaint, and that, by the provisions of our practice act, every material allegation not specifically controverted by the answer must, for the purposes of the action, be taken as true.

This presents to us the question for our consideration in this case. If this is a material averment within the meaning of the practice act, in the complaint, then undoubtedly the position taken by the appellants is correct. If it is not a material averment within the meaning of that act, then they are wrong, and no error was committed by the court below.

At common law every material allegation in the declaration, not put in issue by the plea for the purposes of the action, was taken as true. The failure, however, to plead to the declaration did not, in that practice, admit the correctness of the amount of damages claimed.

The *ad damnum* clause of a common-law declaration, in which the amount of damages was specified, was considered only a formal allegation, and the objection for any defect in it could be taken only by a special demurrer. The amount of damages which the plaintiff could recover depended upon the proof adduced upon the trial. A party could not recover more damages than he claimed, but no matter how much was claimed, he could not recover more than the proof showed he was entitled to. The court could assess the damages or call upon a jury to assess them.

Has this been changed by the Code? Has the Code made the *ad damnum* clause of a declaration a material averment? Is it necessary to state, as one of the facts constituting a cause of action, the amount of damages sustained. If so, then under the Code, should the complaint fail to set forth the amount of damages sustained, a general demurrer to the complaint that it did not state facts sufficient to constitute a cause of action would be sustained. Such practice, however, we hold, would not be correct. If a complaint sets forth facts, showing that a party has been injured, the law presumes that he has been damaged to some extent. If he does not specify the amount of damages sustained, he will be entitled to nominal damages. A party need not allege what the law implies. If the amount of damages or the debt claimed was a material averment, then an answer traversing this allegation would raise a material issue. Yet it has been held repeatedly, since the adoption of the Code, that such a traverse raised no material issue. The Code, in prescribing the requisites of a complaint, gives as the third: "A demand of the relief the plaintiff claims; if the recovery of money or damages be demanded, the amount thereof shall be specified."

This clause the authors of our Code intended as a substitute for the *ad damnum* and concluding clause of a common-law declaration, and the prayer for relief in a bill in equity. The allegation of damages, in the complaint in this cause, is substantially the *ad damnum* clause of common-law declaration. True, there is a demand for relief in another clause. The crowding into a complaint unnecessary allegations, however, will not make them material. To give any other construction to this averment, in the pleading under consideration, would render certain portions of our Code meaningless.

Section 150 of the Code provides, that upon failure to answer "in an action arising *upon contract* for the direct payment of money or damages only," the clerk may enter judgment for the amount claimed in the summons.

In actions not upon *contract*, for the recovery of damages

in whole or in part, the court may order the damages assessed by a jury.

The plaintiff (no answer being filed at the expiration of the time prescribed by law for defendant to file his answer) is entitled to a default. A default admits every material allegation in a complaint, as effectually as the failure to traverse any material specific allegation in the complaint, by the answer, admits that allegation. If the damages claimed is a material averment in the complaint, then a default admits its truth; and why is a court given authority to have the damages assessed by a jury? The admission, if one, is of record, and more binding than the verdict of a jury. The only answer that we can conceive to this is, that the framers of our Code did not consider the averment of damages sustained in a complaint a material averment, but only the moneyed relief for the wrongs averred.

The case of *Patterson* v. *Ely*, 19 Cal. 28, cited by the counsel for appellants, is not in point. That was an action of ejectment, and for rents and profits for the premises during the period the defendant occupied them. The plaintiff alleged the value of rents and profits, as it was necessary for him to do. The law would not presume that the rents and profits were of any value, unless they were alleged. The defendant failed to deny the value of the rents and profits, and admitted the truth of the allegation, as much as if in an action to recover the value of goods, wares and merchandise, the plaintiff should have alleged the value of the goods, and the defendant, should he fail to deny the value, would admit the value alleged. The allegation of damages in the complaint cannot be construed into an allegation of the value of the beaver suits not furnished, and, as we view this action, it was not necessary to allege the value of the beaver suits. Their value could be proven, to show the damages sustained by the false and fraudulent representations; neither is this allegation of any force, if it can be construed as an allegation for specific damages for the profits the plaintiff might have gained by

the re-sale of said goods. Such a ground for specific damages is too remote.

For the foregoing reasons, the judgment of the court below is affirmed.

Exceptions overruled.

WARREN, C. J., concurred.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1870, HELD IN VIRGINIA CITY.

Present:

HON. HENRY L. WARREN, CHIEF JUSTICE.
HON. HIRAM KNOWLES, }
HON. GEORGE G. SYMES, } JUSTICES.

McCORMICK, respondent, *v.* LARGEY et al., appellants.

PARTNERSHIP—*no accounting necessary if profits are not denied.* In an action to recover a certain sum as the share of the profits of a partnership transaction, a reference or accounting is not necessary, if the answer does not deny that such profits were made.

DEPOSITION—*when certificate is insufficient.* The certificate of a deposition which does not state that the witness was sworn before giving his evidence, or that it was read to, or corrected by, the witness, is insufficient.

DEPOSITION TAKEN BY NOTARY PUBLIC OF A STATE. A deposition, which has been taken by a notary public in any State, cannot be read in evidence in the courts of this Territory.

PRACTICE—*presumption in favor of ruling of court below.* If the transcript does not contain the certificate of a deposition, this court will presume in favor of the court below that such certificate is insufficient, although the clerk says in a note in the transcript, "Here follows the proper certificate."

DEPOSITION—*narrative form.* A deposition, which is taken in the narrative form, is legal.

Appeal from the Third District, Lewis and Clarke County.

This action was tried in the district court in Lewis and Clarke county, in April, 1870, and the jury returned a verdict for McCormick for $5,843.75, on which the court entered judgment. During the trial the defendants offered in evidence the depositions of S. B. Rice and L. S. Wild. The plaintiff moved to suppress the portions of the same that were taken in narrative form. The defendants also offered in evidence the deposition of S. A. Willey. The plaintiff moved to suppress this deposition, because it was taken by a notary public in the State of Vermont, on February 18, 1869. The court, Knowles, J., sustained both motions, and defendants excepted.

The other facts are stated in the opinion.

Word & Spratt, for appellants.

The pleadings do not support the judgment. It is a rule in chancery, not affected by our Code, that no relief can be granted for matters not charged in the complaint, although they may be apparent from some parts of the pleadings and evidence. The only issue submitted to the jury was this: Whether or not a partnership existed between the parties? When they found this issue their power ceased. Their finding for the sum of $5,843.75 was outside of this issue and pleadings, and absolutely void. 8 Abb. Dig. 368: *Kelsey* v. *Western*, 2 Comst. 506; *Bailey* v. *Ryder*, 6 Seld. 363.

The court erred in not disregarding that portion of the verdict which found for plaintiff for $5,843.75. It should have ordered an account to be taken of the partnership dealings between the plaintiff and defendant, Largey, in accordance with the prayer of the complaint and practice in courts of equity.

The court erred in suppressing the depositions of Willey, Rice and Wild, and thereby excluding material evidence for appellants' defense. *Carpenter* v. *Norris*, 20 Cal. 437; *Merle* v. *Matthews*, 26 id. 467; *Janson* v. *Brooks*, 29 id. 214; 1 Greenl. Ev., §§ 320, 390.

Appellants' counsel also cited the following authorities in reply to those relied on by respondent: Civil Prac. Act, §§ 322 to 326; *Harper* v. *Minor*, 27 Cal. 107; *Lucas* v. *San Francisco*, 28 id. 591; *Solomon* v. *Reese*, 34 id. 28; *Cowing* v. *Rodgers*, 34 id. 648; *Putnam* v. *Samplin*, 36 id. 151; *Sharp* v. *Daugherty*, 33 id. 505.

CHUMASERO & CHADWICK and WOOLFOLK & TOOLE, for respondent.

The respondent's right to one-half of the profits was denied in the answer, but the amount of the profits is not denied; it is therefore admitted. No accounting was necessary under the pleadings. When the jury found that the respondent was entitled to one-half of the profits, the court was authorized to enter judgment.

There was no motion for a new trial in the court below, and no exceptions were taken to the findings, which are therefore conclusive. This court cannot go beyond the judgment roll and the decree must stand, if the findings support it. *Duff* v. *Fisher*, 15 Cal. 378; *James* v. *Williams*, 31 id. 211; *Lucas* v. *San Francisco*, 28 id. 591; 2 Danls. Ch. Pr. 1330, 1365; 1 Barb. Ch. Pr. 446, 465.

No finding as to the amount due respondent was necessary to sustain the judgment. No issue being made thereon by the answer, the fact is immaterial and cannot be assigned as error. *Swift* v. *Muygridge*, 8 Cal. 445; *Fox* v. *Fox*, 25 id. 587.

The suppression of the depositions was not error. The so-called depositions of Rice and Wild were simply affidavits, and could not be read as evidence upon the trial. The deposition of Willey was not taken according to the statute. Civ. Pr. Act, §§ 404, 405; Acts 1869, 66, § 17.

SYMES, J. This was an action brought by plaintiff against the defendant, for one-half the profits arising from the fulfilling of a contract for supplying forage to the government. The complaint alleged that defendant Largey entered into a contract with N. S. Constable, United States quartermaster,

to deliver several thousand pounds of oats and hay to the military posts of forts Shaw and Ellis; that plaintiff became jointly interested with him in said contract, and that the profits arising from said contract were $11,687.40, and demanded judgment for half that amount.

Largey, only, appeared and answered, and denied that plaintiff was jointly interested with him in the contract, and admitted that he had agreed, on condition that plaintiff would procure and execute the necessary bond to the United States quartermaster, for the faithful performance of the contract, and devote time and attention to buying grain, and furnish some of the money to purchase same, he might become jointly interested with him, and alleged that plaintiff did not furnish the bond or perform said conditions, and denied his right to any interest in the profits.

The case was tried at the March term, 1869, and a verdict found for plaintiff for the sum of $5,843.75, and the jury specially found that plaintiff and defendant Largey entered into a copartnership to fulfill the contract Largey had made to supply the government with forage, and that said plaintiff and defendant Largey sublet said contract to defendants, Kirkendale and McAdow, to be by them performed.

The errors assigned are: 1. That the court erred in not disregarding that portion of the verdict which found $5,843.75 for plaintiff, and ordering an account to be taken of the partnership dealings. 2. That the court erred in suppressing depositions offered in evidence by defendants.

The amount of profits alleged by plaintiff to have resulted from the joint or copartnership transaction was not denied in the answer. The only issue raised by the pleadings was, whether or not plaintiff and defendant Largey were jointly interested in the contract, and plaintiff entitled to one-half the profits arising therefrom. The jury found specially for the plaintiff on this issue, and found, further, in accordance with allegations of complaint, that as partners, they sublet the contract; and, in the general verdict, found for the plaintiff half the amount alleged in the complaint to have arisen from the joint transaction. The plaintiff did not ask

for an accounting, but alleged a single transaction to have taken place between him and defendant; that the same was entirely closed; that the profits arising therefrom amounted to $11,687.50, and ask judgment for $5,843.75, his share under the partnership. Sections 182 and 183 of the Civil Code provides when a reference may be ordered, but in no case is it mandatory that there shall be a reference. There was no occasion for a reference in this case; there were no partnership or other accounts to be examined; there was no dispute as to the amount of profits arising from the fulfilling of the contract. The jury, after finding specially that the parties were jointly interested, found, in their general verdict for the plaintiff, half the amount admitted to have arisen from the joint transaction which had been closed. The court could have rendered judgment for said amount on the special findings of the jury, and pleadings, without the general verdict, the amount not being denied in the answer. *Fox* v. *Fox*, 25 Cal. 587.

The certificate attached to the deposition of S. A. Willey is not sufficient; it does not state that the witness was sworn before giving his evidence, nor that it was read to the witness or corrected by him, and the deposition was taken out of this Territory in the State of Vermont, by a notary public, which officer could not take depositions out of this Territory to be used therein; and, if empowered, there is no certificate attached that he was a notary public, duly commissioned and qualified to act as such. Civil Code, §§ 404, 405, 408. In the bill of exceptions, excepting to the suppressing of the depositions of Rice & Wild, there is no certificate of the officer attached. The clerk puts a note in the transcript, saying "here follows the proper certificate," but the court, from this, cannot say that there was a proper certificate, and will presume, in favor of the court below, that there was not.

The bill of exceptions, to suppressing the depositions, states that they were objected to because taken in the narrative form, and that the court sustained this objection. We are acquainted with no rule of law which prevents deposi-

tions being taken in the narrative form. A witness stating all he may know of the matters in issue in a case, in answer to one question, would be as legal as if he told it in answer to many, and better than to allow numerous questions, which, although legal, may tend to inform the witness the answers sought. The court erred in giving this as a reason for suppressing the depositions, but the error does not affect the judgment from any thing seen in the transcript.

Exceptions overruled.

MORGAN et al., respondents, *v.* REYNOLDS, appellant.

REPLEVIN — *measure of damages — interest.* In an action in the nature of replevin, to recover certain mules and harness, a party is entitled to the property, and the value of its use, from the time he was deprived of it to the day of trial. Legal interest on their value, during the period of detention, is not the measure of damages.

REPLEVIN — *excessive damages.* In this case the amount of damages was not excessive.

Appeal from the Third District, Lewis and Clarke County.

ON December 4, 1869, Morgan and Embody commenced this action to recover the possession of two mules and harness, or the value thereof, and "$5 for each day the same were detained," and $100 further damages. In April, 1870, the jury rendered a verdict for plaintiffs for the delivery of the property valued at $200, and also $204 damages. Reynolds obtained possession of the property on November 30, 1869.

Defendant moved for a new trial upon three grounds: misconduct of the jury, excessive damages, and insufficiency of the evidence to justify the verdict. The motion was overruled by the court, SYMES, J., and defendant appealed.

The other facts appear in the opinion.

SMITH & CULLEN, for appellant.

In an action, either on contract or tort, damages can only be assessed up to the time of the commencement of the suit,

and if the jury assess damages up to the time of the trial of the case it is error. *Powers* v. *Ware*, 4 Pick. 107; *Pierce* v. *Woodward*, 6 id. 207; *Leffingwell* v. *Elliott*, 10 id. 204.

Damages arising subsequent to the commencement of the suit could only be recovered therein by filing a supplemental complaint. Civ. Prac. Act, § 67. When the judgment rendered is for a larger sum than that claimed in the complaint, it is sufficient ground for a new trial. Hilliard on New Trials, 433, § 5.

An application for a new trial, on the ground of excessive damage, is most favorably considered in a case for a tort done to property, when there is a definite basis for the calculation of damages. Hilliard on New Trials, 436, §§ 14, 16.

The measure of damages in an action for the recovery of specific personal property, is the value of the property between the taking of the same and the commencement of the action, together with damages for its detention, which damage is the legal interest on the value of the property. Sedgw. on Dam. 582; *Nickerson* v. *Chatterton*, 7 Cal. 568; *Seaver* v. *King*, 9 id. 562; Morris on Replev. 193.

LAWRENCE & HEDGES, for respondents.

No affidavit accompanies the record on appeal of any misconduct of the jury. Civ. Prac. Act, § 194; *Branger* v. *Chevalier*, 9 Cal. 362.

The evidence shows that the property was detained one hundred and thirty days; that possession was obtained by fraud, and held by violence; and that the use of the same to respondents was worth $4 and $5 per day.

In this action the judgment may be for more than the value of the property, if it be within the *ad damnum* of the complaint. The value of the property is only one predicate of the recovery. *Coghill* v. *Boring*, 15 Cal. 218. Proof of damages in an action sounding in tort may extend to all facts which occur and grow out of the injury up to the day of the verdict. 2 Greenl. Ev., §§ 260, 268, 268*a*, 635*a*.

Exemplary damages may be assessed. Sedgw. on Dam.

515 to 540. The judgment determines the time of the detention, and the damages sustained. Civ. Prac. Act, § 177; *Edgar McCutchen*, 9 Mo. 768.

KNOWLES, J. This is an action of claim and delivery of personal property. The plaintiffs brought suit to recover the possession of two mules and harness, which they allege the defendant wrongfully and fraudulently obtained possession of, and unlawfully detains the same from plaintiffs' possession, and for damages for the unlawful taking and detention thereof. The case was decided in the court below for plaintiffs.

Defendant moved for a new trial, which was overruled by the court, from which ruling the defendant appeals to this court.

There are only two assignments of error discussed in the brief of appellants, and these are the only ones I think it necessary to consider. The first one is, that the jury committed an error in estimating the amount of damages awarded the plaintiffs, the value of the use of the mules and harness, from the date at which the defendant obtained possession of them to the day of the trial of the cause. I do not think this was error. The plaintiffs were entitled to the value of the use of these mules and harness. It is true that, in actions in the nature of trover, the value of the article converted, together with legal interest thereon from the time of conversion, is the true measure of damages. In trover the plaintiff seeks to recover a moneyed judgment, and it would be proper to allow him only the value of the use of that money which the law declares to be legal interest. This is, however, an action in the nature of replevin. The plaintiffs seek to recover, primarily, the specific property detained, and it would seem to me to be but just that he should recover the value of the use of the property so detained as compensation. Greenleaf, in his work on Evidence, vol. 2, p. 276, says: They (that is damages) should be precisely commensurate with the injury, neither more nor less, and this, whether it be to his person or estate." To be sure, these damages must always be the natural

and proximate consequence of the wrongful act complained of.

What more proximate consequence of the wrongful detention of these mules can there be, than that the plaintiff was deprived of the use of them? It is the immediate and natural consequence of the detention. The defendant claims that legal interest, on the value of mules and harness, is all that the plaintiffs are entitled to recover. This would be an unjust rule When money is sought it is proper enough. It does not wear out with use, or grow old; while animals of burden do both, and thus by use their value is being constantly diminished. The rule that applies to an action for money should not then apply in this case.

I find in Sedgwick on the Measure of Damages (pp. 528, 529) that in Maryland and Texas damages for the value of the hire of slaves were awarded in similar actions to this. And also in note second, same authority, that in the case of *Butler* v. *Mehrling*, 15 Ill. 488, the rule was laid down that in actions of replevin the value of the use of the property is the true measure of damages and not the value of the property alone. I am aware that a different rule from this was expressed in *Dorsey* v. *Manlove*, 14 Cal. 553. This point, however, was not really presented to that court in that case for decision. The real question was, whether the damages proved by the plaintiff were not too remote, and upon that point it can unquestionably be sustained. There is one other consideration to be considered in that case, namely, that really the action was more in the nature of trover than replevin, for it appears that the defendant had sold the horses in controversy. In trover the rule therein declared is undoubtedly correct. It was not only proper that the plaintiffs should recover the value of the use of the mules, but that they should recover it up to the time of trial.

In actions for the recovery of money the plaintiff always recovers as damages the legal interest on the money up to the time of trial. In trover it is almost a universal rule that the plaintiff recovers interest from the time of conversion

up to the time of trial. See Sedgwick on Measure of Damages, 517, 518 and notes. The case of *Dorsey* v. *Manlove*, cited above, lays down the rule for the measure of damages as follows: "The value of the horses sold by the defendant together with legal interest up to the time of trial." In Greenleaf on Evidence, vol. 2, section 268, in treating generally of trespass, it is said: "And it is further to be observed that proof of actual damages may extend to all facts which occur and grow out of the injury, even up to the day of the verdict." If in actions of this character the rule is as above, I cannot see why any different rule should be made in replevin. In the Texas case, cited in Sedgwick on Measure of Damages, referred to above, I find the following: "Damages for the hire should be computed from the time of the demand to the rendition of judgment." This was an action for the recovery of a slave and for his wrongful detention. I do not think there can be much doubt of this rule.

The second error assigned I shall notice is, that the damages were excessive. The evidence shows that the defendant wrongfully got possession of the mules. From the time of the getting possession until the time of trial there were more than one hundred days. The defendant had possession of the mules all this time. The only positive evidence as to the value of the use of the mules, fixed it at from $4 to $5 per day. The jury assessed the damages at $204. They must have estimated the value of the use of the mules at less than two dollars per day.

In the case of *Dorsey* v. *Manlove*, referred to above, much is said in relation to punitive or exemplary damages. Without stopping to discuss whether they would be allowed in such a case as this, I may say if they were the damages assessed by the jury, are very moderate, as there were many aggravating circumstances connected with the obtaining possession of the property in dispute and the persistent detention of the same.

The judgment of the court below is affirmed.

Exceptions overruled

THORP, respondent, *v.* WOOLMAN, appellant.

STATUTORY CONSTRUCTION — *statute regulating irrigation — award of commissioners void.* The powers conferred on commissioners to apportion water under the fourth section of the act "to protect and regulate the irrigation of land in Montana Territory," approved January 12, 1865, are judicial, and cannot be granted by the legislative assembly. The award of such commissioners is void.

STATUTORY CONSTRUCTION — *statute regulating irrigation — doctrine of appropriation.* The act regulating irrigation in this Territory recognizes the doctrine of the appropriation of water for irrigation, but limits the right and quantity to certain persons.

RIGHT OF FIRST LOCATOR OF LAND. Law and equity give the first locator of land and claimant of water a sufficient quantity of water to irrigate his land.

Appeal from the Third District, Lewis and Clarke County.

IN this action, Thorp and Woolman filed their agreed statement of facts in the district court for Lewis and Clarke county, on March 14, 1870. The attorneys of the parties also filed a stipulation "that the above agreed statement is made with reference to the settled customs and usages of Montana Territory, of which we desire that the court shall take judicial notice." On June 10, 1870, the court, SYMES, J., signed a decree in favor of Thorp, and Woolman appealed.

Section 4 of the act approved January 12, 1865, which is referred to by counsel and the court, is as follows:

SEC. 4. That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all."

The opinion contains the other facts.

SHOBER & LOWRY, for appellant.

Appellant relies upon the statute of the Territory. **Acts** 1865, 367, 368, 369.

WOOLFOLK & TOOLE, for respondent.

The courts of the Territory, like those of California, hold that rights to water are determined by priority of appropriation. Has the statute referred to by appellant changed this rule? In controversies between minors and ranchmen, this doctrine of priority prevails and should be of general application. The appellant's interpretation of this statute makes prior appropriation of no avail. The whole of the statute must be construed together, and custom and usage must be considered to ascertain the intention of the legislature. Sedgw. Stat. Law, 231 to 239; *Jackson* v. *Gumaer*, 2 Cow. 567; *M'Keen* v. *Delancy*, 5 Cr. 22; *Cullerton* v. *Mead*, 22 Cal. 95.

Sections 1 and 4 must be construed together. Can all the ranchmen upon a stream insist that the water thereof shall be divided among all of them, without regard to the time of their settlement? The water granted by section 1 of the statute would be taken by others, and the first locator would not have water to the "full extent of the soil." There is nothing in section 4 which provides that priority shall not prevail, or that the water shall be equally divided. The commissioners are to apportion the water in a "just and equitable proportion," and with a due regard to "legal rights." The object of this statute was to save litigation with regard to water rights, and the commissioners are made a new tribunal to settle controversies. The organic act vests judicial power in certain officers. This statute vests it in commissioners. Being clearly in violation of the organic act, it is void. Organic Act, § 9; *People* v. *Collins*, 19 Wend. 56; *French* v. *Teschemaker*, 24 Cal. 518; *Burson* v. *Cowles*, 25 id. 535; *Reed* v. *Omnibus R. R. Co.*, 33 id. 212.

The court should act as a legislator if the statute is ambiguous. Sedgw. Statutory Law, 294.

If a statute, which confers a new right and remedy, is void, the right and remedy fall with the statute. *State* v. *Poulterer*, 16 Cal. 515, and cases cited; *Almy* v. *Harris*, 5 Johns 175.

KNOWLES, J. This cause was presented to the court below on an agreed statement of facts. It appears, from this, that the respondent and appellant each owned a ranch on Prickly Pear creek. That of the appellant's was higher up the creek than that of respondent's. The respondent first located his ranch, and, at the same time, claimed three hundred inches of water in this creek for the purposes of irrigating his land. In 1869, owing to a drouth, this was all the water there was in this creek, and this much was necessary to irrigate the land of respondent. The appellant then applied to the nearest magistrate, in accordance with the provisions of "An act to protect and regulate the irrigation of land in Montana Territory," approved January, 1865, for the appointment of three commissioners to apportion what water there was in the creek between him and respondent. This commission met, and awarded one-half of the water to appellant, leaving the respondent the other half.

The respondent asks a decree against the appellant for three hundred inches of water. The case may be said to be an action to quiet title, presented to the court upon these facts. The court below gave judgment to the respondent for three hundred inches of water. From this judgment the appellant appeals to this court.

The first question presented is this award of the commission. The powers given this commission by the act under which they conducted their proceedings are clearly judicial. They are empowered by it to apportion the waters in a just and equitable proportion. This required them to determine what was just and equitable between these parties. In the next place the apportionment was to be made with a due regard to the legal rights of all. This required of them to determine what these legal rights were. The organic act of

this Territory, which is its fundamental law, limits the powers of legislation, vests judicial power in a supreme court, district courts, probate courts, and in justices of the peace. No tribunal which does not belong to one of these classes is legal. As this commission cannot claim to belong to either one of these, it was a tribunal exercising judicial authority without legal warrant, and its acts are void. The appellant gained no rights whatever by virtue of this award.

It is not necessary for the court to determine, in this case, whether or not the doctrine of appropriation applies to ranchmen as well as to miners, concerning water rights, for the statement of facts shows that the ranch of appellant was above that of the respondent, and that, at the time this dispute arose, three hundred inches of water was flowing down the creek by appellant's ranch, which clearly indicates that the water had not been taken out of the creek above it. As a riparian proprietor the respondent would be entitled to have the waters of the creek flow down its accustomed and natural channel undiminished in quantity, and, below appellant's ranch, could divert the same for purposes of irrigation as against him. The counsel for appellant, in their brief, say they claim their rights by virtue of the above statute. There are many reasons for holding that this very statute recognizes or establishes the doctrine of appropriation of water for irrigation, limiting, however, the right to appropriate to persons owning land upon the banks of the stream from which the same is taken, and also limiting the quantity of water he can appropriate to what is necessary to irrigate his land. The permission given by that act to take water out of its natural channel for purposes of irrigation, where it damages land holders below the point where the water is diverted, is incompatible with the common-law doctrine in the case of riparian proprietors.

Section 4 of the act I do not think, in any way, militates against this view. Any tribunal, governed by the established principles of law, making an apportionment of water in accordance with what is just and equitable, would

be compelled to hold that the one who first located the land, and claimed the water, was entitled to sufficient to irrigate his land; for equity declares that he who is first in time is first in right.

In this case the respondent was first in time, and, giving the construction to the statute indicated above, under it he would, undoubtedly, be entitled to the water in dispute.

For these reasons the judgment of the court below is affirmed, with costs.

Exceptions overruled.

GERBER, respondent, *v.* STUART et al., appellants.

MAKER OF PROMISSORY NOTE—*proof of agency—intention of parties.* In an action against a person who signed a promissory note, "Jas. Stuart, Gen. Mang. & Supt. St. L. & M. M. Co.," the defendant's personal liability will not be presumed; and he can introduce evidence showing that he made the note for the mining company, of which he was the agent, and that it was the intention of all the parties that the company should pay the note, and that he was not to be held liable thereon.

PAROL CONTRACT—*name of principal.* The name of the principal need not appear in the body of a parol contract.

Appeal from the Third District, Lewis and Clarke County.

ON June 25, 1869, Gerber commenced this action against Saunders and Stuart, upon a promissory note. Stuart filed a separate answer on July 12, 1869. On motion of the plaintiff, the court, WARREN, J., struck out parts of this answer. On July 16, 1869, Stuart filed his amended answer. On motion of the plaintiff, the court ordered parts of the same to be struck out. On July 19, 1869, Stuart filed his second amended answer. The plaintiff then moved to strike this answer from the files, and assigned among other reasons therefor, that the answer was sham and irrelevant and no defense. The court sustained the motion and rendered judgment for plaintiff for $5,481, and Stuart appealed.

The pleadings are contained in the opinion.

WOOLFOLK & TOOLE, for appellants.

The court erred in striking out the first and second answers of Stuart. An agent is not liable personally in contracts not under seal, where the name of the principal and fact of agency are disclosed, however informally it may be expressed. If the principal's name does not appear, it may be proved that the party dealing with the agent knew the principal. *Sayre* v. *Nichols*, 7 Cal. 542; *Brockway* v. *Allen*, 17 Wend. 40; Story's Agency, § 160 *a*; 2 Am. Lead. Cas. 380; Story's Prom. Notes, § 69.

Where the signature of the party indicates that he was signing for another, although it be the apparent obligation of the agent, parol evidence is admissible under modern authorities to establish the liability of the principal and release the agent. *Brannan* v. *Mesick*, 10 Cal. 95; *Richardson* v. *Scott River W. & M. Co.*, 22 id. 150; Ang. & A. Corp., § 296.

An agent of a corporation sued on a note can show by evidence that the credit was given to the corporation and not himself. 2 Am. Lead. Cas. 632.

An agent having authority to bind his principal, and executing this authority, is not personally liable. The facts set up in the answer render the corporation liable to respondent, and consequently release the agent. Ang. & A. Corp., § 296.

Whenever a state of facts would maintain an action in equity, the same facts can be pleaded as a defense under our practice. If Stuart is not permitted to prove the facts set up in his first and second answers, the express agreement of the parties is violated.

The court erred in striking out the third answer. Stuart had a right to prove that certain words changing his liability were omitted from the note by mistake. *Hathaway* v. *Brady*, 23 Cal. 121; *Stacy* v. *Abbott*, 1 Law Times, 84.

SHOBER & LOWRY, for respondent.

Where a promissory note is signed by two persons in the same manner, one of them cannot set up a defense that he

was only surety. If a note is signed by a person with the words "agent or superintendent" added, these words are merely a description of the person, who is personally liable. Story's Ag., §§ 155 to 159; *Stackpole* v. *Arnold*, 11 Mass 29; *Bentz* v. *Stanton*, 10 Wend. 271.

No person is considered an agent of another unless he stipulates for his principal by name, and states his agency in the instrument he signs. Story's Prom. Notes, §§ 65, 74.

The maker of a promissory note is bound by the contract he signs. *Aud* v. *Magruder*, 10 Cal. 289; *Krutzer* v. *Mill*, 23. No action could be maintained on this note against persons except Saunders and Stuart, and Stuart is estopped from setting up a liability in any other person.

The note sued upon is a joint and several contract. There is no ambiguity upon the face of the note. The position of appellants, if correct, would permit oral testimony to vary the terms of a written contract. *Hemmenway* v. *Stone*, 7 Mass. 58; 1 Pars. on Cont. 11; 1 Greenl. Ev., § 275.

The third answer was properly stricken from the files. It was filed without leave of court, notice or meritorious showing. Civ. Prac. Act, § 68.

This appeal was taken for delay. Respondent claims damages therefor under the statute. Civ. Prac. Act, § 329; *Ricketson* v. *Compton*, 23 Cal. 649; *Nickerson* v. *California S. Co.*, 10 id. 520.

SYMES, J. This was an action on a promissory note by plaintiff, assignee, against the defendants, makers. The cause was tried before the third judicial district court, for Lewis and Clarke county, at the July term, 1869, and judgment rendered on the pleadings after the separate amended answer of James Stuart was stricken from the files, and appeal taken from the judgment roll.

The question presented is, whether the new matter set up in the answer and amended answer, which was stricken from the files, if proved, would constitute a legal defense.

The complaint declared on the note in the usual form, setting out a copy as follows, to wit:

"$4,300.

"PHILLIPPSBURG, DEER LODGE COUNTY, MONTANA TERRITORY, *August* 31, 1868.

"Thirty days after date, for value received, I promise to pay Donald Chrisholm or order, at Phillippsburg, the sum of forty-three hundred dollars, with interest at the rate of five per cent per month until paid.

"COLE SANDERS.

{$2.80 U. S. stamp duly canceled.}

"JAMES STUART,

"*Gen. Manag. and Supt. St. Lo. & M. M. Co.*"

Indorsed: Donald Chrisholm, November 4, 1868.

And alleged that on the 4th of November, 1868, said Donald Chrisholm transferred and delivered said note, duly indorsed, to plaintiff, who was owner and holder thereof; that no part had been paid except the sum of $784, and demanded judgment for $5,484 and costs.

The separate and amended answer of defendant Stuart contains a general denial, and sets up that at the time of the execution of the note he was "general manager and superintendent of the St. Louis and Montana Mining Company," a corporation created by the laws of the State of Missouri; that he executed said note in his said capacity of "general manager and superintendent of the St. Louis and Montana Mining Company;" that it was expressly agreed between the said Donald Chrisholm and this defendant, at the time of the execution of said note, that defendant was not to be personally responsible thereon; that he executed the note simply as agent for said mining company; that the intent and design of defendant in signing said note, as "general manager and superintendent of the St. Louis and Montana Mining Company," was to bind the said company, as principal in said note, jointly with said Sanders, but in no way to bind himself; and that such intent and design was expressed at the time of the execution of the said note to said Chrisholm, who accepted said note, so signed, with full knowledge of such intent and design; that the object of defendant, in signing said note, was to carry out said intention of

the parties, and to bind his said principal, and that defendant, knowing that it was necessary to put his signature to said note, should indicate that he signed the same, in his capacity as manager and superintendent for said St. Louis and Montana Mining Company, in order to bind the said principal, by inadvertence and mistake omitted the word "as" before the words "manager and superintendent;" also, the word "for" after the word "superintendent," which was the way he intended it to be. Further, that if defendant is not allowed to show his mistake it will operate as a fraud, and violate the intent and design of all parties to the note; that he had no personal interest in the consideration for which said note was given; that it was given for mining property purchased from said Chrisholm, and the design was to benefit said mining company by acquiring an interest for them in the mining ground jointly with said Sanders; that defendant, as manager and superintendent of said company, had often exercised similar authority for the benefit of said company, which had been ratified by them, and had full authority to bind said company by said signature; and that plaintiff knew of the aforesaid agreement between Chrisholm and defendant, and holds the note subject to all the rights and equities of defendant.

Does the allegation of the answer set up a legal defense on the part of defendant Stuart, to the notes, and, if so, will the law allow him to show it, or will it conclusively presume an absolute liability from the face of the note, and not allow defendant to prove any other? This depends on whether the addition to the defendant Stuart's name of "general manager and superintendent of the St. Louis and Montana Mining Company," shall be taken conclusively as *descriptio personæ*, or whether he will be allowed to explain the addition, and to show *aliunde*, that it was intended by the parties to express that he acted as agent, and that the consideration moved to his principal under circumstances which releases the agent from personal liability. While there appears, on examination of the authorities, especially the older ones, that the addition to a signature of "agent,"

"president," "superintendent," and similar words, have been held to be mere descriptions of the person, and not of the capacity in which the party acted; the modern rule seems to be that if from the whole instrument it appears that the parties intended to act for and bind his principal, the principal and not the agent will be bound; and that where the addition or description is so inartificially expressed as to leave it in doubt, or ambiguous, from the face of the instrument, evidence *aliunde* will be admitted to explain and show the actual intention of the parties. Parsons, after citing numerous cases, some of which appear contradictory, says, that the recent cases and the best reasons for determining in each instance, and with whatever technical inaccuracy the signature is made, whether a party is a principal or an agent, is from the facts and the evidence to show the intention of the parties to the contract. 1 Pars. on Cont. 54, 57; 1 Pars. on Bills, 167 and note; Story on Prom. Notes, 70. We find that in the difficult cases decided the instructions of the court are the foundation of the decisions, showing that where it was doubtful the cases have been submitted to juries. *Sayer* v. *Nichols*, 7 Cal. 535; 5 Cush. 158.

In sealed instruments the name of the principal must appear in the body of them; but this is not required of parol contracts. Perhaps the weight of authority is that where a party signs his name to a contract with only the addition of "agent," "manager," etc., that he will be held personally liable if he does not disclose the name of his principal, although the case in 7 California and some others lean to the contrary; this case does not come within that principle. The party sued on in this action does not sign his name merely with the addition of "agent, manager, or superintendent," without disclosing the name of any other person, but signs his name and adds "Manager and Superintendent of the St. Louis and Montana Mining Company," disclosing the full name of a known mining corporation. We are not called upon to decide whether the note herein presents a *prima facie* case against defendant, but whether

on its face it shows such a conclusive personal liability against defendant as will estop him from setting up in his answer and proving the real situation, knowledge and intention of the parties at the time of the execution. Story, in his work on Agency, says that it is often difficult to determine from the face of an instrument whether or not an agent is personally liable, and that it is impossible to reconcile all the cases. He cites one case as follows: "I promise to pay," etc., and is signed "A B" for "C D" (the principal), and says in this case it was held the agent was not personally liable; and adds in a note to cases cited, that the liability in many cases depends on the state of facts shown to exist at the time the contract was made, and sometimes to whom the credit was given. Story on Agency, (Redfield's ed.), 346, 351.

Testing this case by these principles, we think the court below erred in striking out that portion of the amended answer which alleged that the payee in the note knew at the time of its execution that he acted as agent of the mining company; that it was the intention of all parties that the mining corporation, and not the agent, should be liable thereon; that the payee gave the credit to the principal and not to defendant; and that the contract was made for the benefit and the consideration moved to the principal, said mining company. And the note being transferred to plaintiff after it had become due, this defense is good against him.

If two persons sign a note as principals without any thing on the face to show that one intended to sign as surety, still it may be shown *aliunde*, as between the payees, that one intended to become liable only collaterally as surety; and if the word "surety" is added to the signature it will be presumed *prima facie* from the face. 2 Smith's Lead. Cas. 380. Then will it be contended that where a party signs a contract with the addition of "Manager and Superintendent of the St. Louis and Montana Mining Company," that the law will not only *prima facie* hold him liable personally from the face of the contract, but will con-

clusively presume him absolutely liable and not allow him to set up and prove the real facts and intention of the parties at the time the contract was executed. We think it would be in opposition to the established principles of our modern commercial law.

Judgment reversed and cause remanded.

Exceptions sustained.

FEBES et al., appellants, *v.* TIERNAN et al., respondents.

TRESPASS PRESUMED TO BE MADE WITH FORCE. The law implies that an unauthorized entry, upon the premises of another, is made with force, and no evidence of such force is required.

PLEADING—*trespass—allegation of force.* Actual force is not necessary to constitute a trespass upon land, and it is not necessary to allege, in actions in the nature of trespass, that the injury was forcible.

GENERAL VERDICT—*special findings.* A general verdict should not be set aside, unless the special finding is undoubtedly inconsistent with it.

Appeal from the First District, Madison County.

FEBES, and others, commenced this action in July, 1870, in the district court, to enjoin Tiernan and another from injuring their water ditch, and recover $2,500 damages for injuring said ditch, and diverting the water therefrom. The jury returned a general verdict for $200 for plaintiffs, and certain special findings. The defendants filed a motion in arrest of judgment on the verdict, because the jury did not find the defendants guilty of trespass, or the use of any force in committing any acts against the property of plaintiffs, and the special findings were in conflict with the general verdict. On August 2, 1870, the court, WARREN, J., sustained the motion, and entered judgment for defendants. Plaintiffs appealed.

WORD & SPRATT, for appellants.

There was no conflict between the general and special findings of the jury. Every material fact was found for

the appellants. The finding that there was no force should have been disregarded by the court. This issue was not submitted to the jury, and was more a conclusion of law than of fact. 1 Chit. Pl. 205; 1 Bouv. L. D. 535; *McDermott* v. *Higby*, 23 Cal. 489.

The law presumes that every material issue, not submitted to the jury in the special findings, was found in the general verdict. *McDermott* v. *Higby*, 23 Cal. 489.

The court erred in assuming to determine the issues without the intervention of a jury, and thereby abused its discretion, and deprived parties of their right to a trial by jury. The judgment of the court is not consistent with the verdict and findings of the jury.

H. N. BLAKE, for respondents.

This is, substantially, an action of trespass. An injunction is asked for in aid of the action. *Brennan* v. *Gaston*, 17 Cal. 373. Special findings control the general verdict when they are inconsistent. Civ. Prac. Act, § 175.

The appellants must prove that the respondents committed the injuries complained of with force. 2 Greenl. Ev., §§ 613, 621, 623. The jury finds that no force was used by respondents. Appellants, having failed to prove the gist of their action, cannot recover for injuries resulting therefrom. *Pico* v. *Colimas*, 32 Cal. 580.

The respondents have not committed any acts that will entitle appellants to a perpetual injunction. Civ. Prac. Act, § 112; *Sherman* v. *Clark*, 4 Nev. 142, 148; Verdict and Findings.

If the court below did not abuse its discretion in refusing to grant the injunction, this court will not reverse the judgment. *Slade* v. *Sullivan*, 17 Cal. 106; *Hicks* v. *Michael*, 15 id. 117.

KNOWLES, J. This is an action for damages sustained by appellants, on account of the wrongful entry of respondents upon their water ditch, and the tearing down of its banks, and the destroying of a dam attached thereto, and

the diverting of its waters. It is in the nature of a common-law action of trespass.

The jury rendered a general verdict for appellants. There were special issues presented to the jury, the second one of which is as follows:

"Did the defendants, or either of them, forcibly injure the ditch or dam in controversy, and divert the waters therefrom, as alleged in the complaint, and if either one of them, which one of them?"

To this the jury returned this answer: "We do not find evidence of forcible injury by either of the defendants."

The counsel for the respondents moved to set the general verdict aside as inconsistent with this special finding of the jury, and for judgment for respondents. The court sustained this motion, and judgment was entered accordingly. This ruling of the court is assigned as error.

Actual force is not necessary to constitute a trespass upon land. 2 Hilliard on Torts, 76. In every trespass *quare clausum fregit* force is implied. 1 Chit. Pl. 126. The unauthorized entry upon the premises of another is a trespass. When such a state of facts is established, the law implies that the entry was done with force, and it is not necessary to offer any further evidence upon that point. The jury found no evidence of forcible injury, yet, if they found the respondent had done the acts complained of, the law implied that they were done with force. It was always necessary, at common-law actions, to be particular in determining whether the injury was the immediate and direct result of the wrongful act complained of, or whether it resulted because or by reason of this act, for this distinction determined whether the action should be trespass or action on the case. One class of injuries was said to be forcible, and the other consequential. At common law the issue whether the injury was forcible or not was not a matter of substance, but only entertained to determine whether the action should be trespass or case. The allegation that an injury was done *vi et armis* has been, for a long time,

treated only as a formal allegation, and the absence of it only a ground for special demurrer. 1 Chit. Pl. 663, 664.

A pleading, in which it was omitted, was aided by verdict. Chit. Pl. 126, note *t*. Under our code system of practice, it is not necessary to allege that the injury was forcible. Van Santv. Pl. 290. Hence, it is not necessary to prove it.

A general verdict should not be set aside unless the special finding clearly controverts it, and is undoubtedly inconsistent with it. In this case the answer of the jury is what might be termed a negative pregnant. It does not say that the defendants, or either of them, did not do the acts complained of, but only that they do not find any evidence that they did them with force. Admitting that it was necessary that they should be done with force, no evidence was required to prove it. The law would imply it.

It may be proper to remark that there are reasons for supposing that the jury were misled by this issue presented them. If it had been told them that if the defendants cut the dam and tore down the banks of appellants' ditch without authority, the law implied that the acts were done forcibly, I apprehend there would have been no difficulty. It can hardly be supposed that a jury were so stupid as to find that the respondents did not commit the acts complained of, and yet find a general verdict against them. The only solution of this difficulty, I think, is, that the jury did find that respondents did commit the acts complained of, which the law would have implied were done forcibly, but that they did not find them accompanied *manu forti*, that is, with such force as in forcible entry and unlawful detainer.

For these reasons I think the judgment of the court below should be reversed, and a judgment entered for appellants, in accordance with the general verdict.

Exceptions sustained.

WILSON, respondent, *v.* DAVIS et al., appellants.

PRACTICE — *findings of referee — not reviewed without testimony.* This court will not review the findings of a referee, if the testimony on which they are based is not made a part of the transcript.

PARTNERSHIP — *partner has lien on joint property.* A partner, who contributes on account of the partnership business any sum in excess of his proportion over his copartner, has a lien upon the joint property for the sum so contributed.

INTEREST — *compound interest — not allowed in equity.* Courts of equity will not allow compound interest, if the contract therefor and the original contract were made at the same time and before any interest was due, and a written agreement to pay such interest shall not be enforced.

INTEREST — *compound interest at common law.* The old common-law rule, which did not allow compound interest, has not been overruled in the United States.

INTEREST — *territorial statute regulates simple interest.* The statute of this Territory, which establishes the rates of interest, relates to simple interest, and does not authorize contracts for compound interest.

INTEREST — *a contract for payment of compound interest not enforced.* A party who agrees to sell real and personal property upon the payment of a note, which stipulates that the interest shall be compounded monthly, if it is not paid, is required to convey the property on the payment of the principal of the note, and simple interest upon the same.

PARTNERSHIP — *rights of partners after dissolution — sale of property.* The member of a partnership, who dissolves it by refusing to continue its business, cannot compel his partner to carry out one article of the copartnership, which stipulates that the excess of funds which either contributes, shall be paid out of the net earnings of the partnership property; and a court of equity can order the property to be sold to pay such excess.

PLEADING — *attorney's fees not recoverable under general prayer.* A reasonable attorney's fee will not be awarded to a party under a general prayer for a certain sum as damages and expenses in protecting "rights, remedies and equities." It should be specifically demanded.

PRACTICE — *jurisdiction — this court examines nothing except decree of court below.* This court can only determine whether or not the decree of the court below should be affirmed, and cannot now consider the effect of the undertaking on appeal upon the order of the court below, for the sale of property.

Appeal from the Third District, Lewis and Clarke County.

THIS case was before this court at the December term, 1868, and is reported, *ante*, p. 98.

On November 4, 1868, Wilson filed an amended and supplemental complaint against Davis, W. L. Perkins and W.

A. Fredericks, which contained the following material allegations: That Davis and Fredericks, on January 30, 1867, owned the property in Gallatin county, Montana, known as the Madison mills; that Davis sold and delivered his interest therein, for two certain contracts, which were as follows:

"GALLATIN CITY, *January* 30, 1867.

"Twelve months from date, for value received, I promise to pay A. J. Davis, or order, five hundred and thirty-three and one-half ounces of bankable gold dust, or its value in treasury notes of the United States, together with five per cent interest from the first day of January, 1867, per month, said interest to be paid monthly, and if not paid at the end of each month, to bear interest the same as the principal. It is agreed that should ninety days' interest accumulate without being paid, then this note falls due.

"W. A. FREDERICKS."

[$4.50 stamp.]

"GALLATIN CITY, *January* 30, 1867.

"For value received, I promise to pay A. J. Davis, or order, seven hundred and thirty-nine sacks of 100 pounds each of No. 1, thribble X flour, manufactured at the Madison mills, in this place, payable as fast as the mill can make the same, the payment to be completed on or before the first day of June next, and if not paid at maturity, I agree to pay any damages that said Davis may sustain thereby.

"W. A. FREDERICKS."

[$3.25 stamp.]

The complaint further alleged that Davis was to make a good deed of one-half of the property to Fredericks, as soon as said contracts were executed; that Fredericks, afterward, executed to said Perkins a deed of trust of the entire property, to secure the payment to Davis of said gold dust and flour; that Fredericks, on February 1, 1867, sold to Wilson one-half of said property for $9,000, and the payment of one-half of the interest payable to Davis on said gold dust contract; that Wilson had had possession of the property from that date, until the appointment of a

receiver in this action; that Fredericks then agreed that Wilson should have the net earnings of the mill, until he was repaid all amounts advanced by him over what Fredericks advanced; that Wilson so advanced $3,000 more than Fredericks to run the mill, and $8,000 in gold dust, flour and money for Fredericks to Davis, besides said $9,000, for all of which he was entitled to a lien on Fredericks' half of the property; that Davis had received on said contracts $25,000, which fully satisfied them; that Davis knew that Wilson had an interest in the property, and refused to receive from Wilson, on May 20, 1867, the sum due from Fredericks to Davis, which Wilson then tendered; that Davis and Fredericks conspired together to prevent Wilson from obtaining a deed to his half of the property; that Wilson was ready to pay any sum that was due from Fredericks to Davis; that Davis had revoked a power of attorney to Perkins, to execute a deed to Fredericks, and that Fredericks had executed to Davis a deed of his interest in the property; and that Davis had a deed to the property from the sheriff of Gallatin county, and that said deeds were fraudulent.

The complaint prayed for an accounting between Wilson and Davis, and that Davis and Fredericks be compelled to execute a deed of one-half of the property to Wilson; that an accounting be had between Wilson and Fredericks, and that Wilson have a lien on Fredericks' half of the property for the amount found due to him; that the trust deed to Perkins, the deed from Fredericks to Davis, and the sheriff's deed to Davis, be adjudged null and void; and that Wilson have quiet possession of his half of the property.

On March 8, 1869, Davis and Perkins filed their answer to this complaint, and admitted the following facts: That on January 30, 1867, Davis and Fredericks owned the property, and that Fredericks made the two contracts for flour and gold dust; that Fredericks made the trust deed to Perkins; that Davis agreed to make a deed of his half of the property when the flour and gold dust were delivered: that Davis also agreed that Fredericks, on giving thirty

days' notice, could satisfy the contracts before maturity; and that Davis had executed to Perkins a power of attorney to make a deed of the property to Fredericks, on payment of the contracts.

The answer denied that Davis ever sold or delivered the property to Fredericks; that the contracts for flour and gold dust had ever been satisfied; that Wilson became the joint owner of the property with Fredericks; that the agreement of Wilson and Fredericks affected the interests of Davis in the property; that Wilson ever tendered the sum due from Fredericks to Davis; that Davis and Fredericks ever conspired together to wrong Wilson; and that Wilson and Fredericks ever had possession of the property.

The answer alleged that Perkins entered into the possession of the property under the trust deed from Davis; that on December 3, 1867, Davis recovered a judgment against Fredericks, upon his confession in writing, on the flour contract, for $7,368, and also a judgment on the gold dust contract for $16,502; that executions were issued on said judgments, under which the sheriff of Gallatin county sold the property, and delivered to Davis a deed thereof, on July 1, 1868; that Wilson had full knowledge of the rights of Davis before he contracted with Fredericks for an interest in the property; that Fredericks owed Davis $17,382, besides $6,500 damages; and that Wilson had wrongful possession of the property, and had appropriated the proceeds, $14,700, and personal property valued at $5,000.

The answer prayed that the property be restored to defendants.

On April 15, 1869, Fredericks filed his separate answer, which was substantially the same as that of Davis and Perkins, and alleged that Wilson agreed to pay him for one-half of the property $9,000, and one-half of the debt, as well as interest, due from Fredericks to Davis; and that, by mistake, the agreement relating to the payment of one-half of said debt was omitted in the writings.

On March 25, 1869, the court, by agreement of the parties, appointed Cornelius Hedges, Esq., a referee, to make an

accounting between Wilson and Fredericks. On June 29, 1869, the court, by agreement of the parties, appointed Henry N. Blake a referee, to report the amount and value of the flour received by Davis from Fredericks or Wilson, or both, on the flour contract; and the sum that would be a reasonable attorney's fee in this cause, for foreclosing and collecting the sum due on the trust deed of Davis.

On March 26, 1869, the parties agreed, in open court, that all questions of fact should be decided by the court.

On April 27, 1869, Hedges, referee, reported that Wilson had paid Fredericks $9,000 as purchase-money for one-half of the Madison mills; and that Fredericks owed Wilson $14,858.16, for the payment of which Wilson was entitled to receive the net earnings of the property. The court, WARREN, J., confirmed this report.

On July 5, 1869, Blake, referee, reported that Davis had received on the flour contract, over the amount credited thereon (125 sacks), 650 sacks of XXX flour, worth $6,460; and that a reasonable attorney's fee for collecting the amount due Davis on the trust deed was $1,500. The court, WARREN, J., confirmed this report.

On July 29, 1869, the court, WARREN, J., rendered judgment, and signed a decree in favor of Wilson, and defendants appealed.

The opinion contains the other facts.

WOOLFOLK & TOOLE, for appellants.

The court failed to find on material issues in the pleadings. Wilson asks no relief from the contract he has set out, but demands a specific performance from Davis. The alleged tender by Wilson to Davis was not made after giving thirty days' notice, according to the agreement between Davis and Fredericks, and was void.

The court does not find that there was collusion between Davis and Fredericks to defraud Wilson. A fraudulent settlement between Davis and Fredericks as to Wilson is not sufficient proof of fraud. The settlement must have been with intent to defraud Wilson.

Material allegations of the complaint, which are denied by the answer and not found by the court, are equivalent to a finding for the defendant. Wilson cannot be subrogated to the rights and equities of Davis. Davis cannot be compelled to give up a good contract to one who acquires an interest in the property with a full knowledge of all the facts. Davis can let his demand run until barred by the statute of limitations.

Davis does not seek to foreclose, and asks no affirmative relief. There could be no accounting between Wilson and Davis on account of contracts between Davis and Fredericks, in which there was no privity between Wilson and Davis.

The decree of the court relieves Wilson in the absence of any prayer for relief, and in the face of his prayer for a specific performance of the contract, and against the plain terms of the contract.

The advances made by Wilson to Davis and otherwise, by express agreement, were to become a lien on the property, and were not payable until they were made from the earnings of the mill. Wilson could acquire no rights in the property that were not subject to those of Davis.

The court erred in not allowing Davis interest upon interest, according to the contract, which Wilson brings this suit to compel Davis to perform. This amounts to $6,424. Wilson cannot pray for relief from one part of an agreement and demand a specific performance of the other part. The court cannot compel a party to sell property for a consideration against his will. A third party can make no such plea after purchasing with a knowledge of the contract. Specific performance on one side requires it on the other.

Wilson must receive what Fredericks owes him from the net earnings of the mill and in no other way. He made this contract and must stand upon it. There is no finding that the net earnings of the property would not liquidate Wilson's demand.

The court erred in ordering a sale of the property and the payment of the proceeds to Wilson. This works an

injustice to Fredericks, who loses his property, the net earnings of which should pay his debt to Wilson. It is an unauthorized violation of the spirit and terms of the contract. Wilson could not have the interest of Fredericks sold to satisfy a partnership debt in this way, for each partner has an interest in the proceeds. Civil Prac. Act, § 264, *et seq.*

The appeal in this case stayed the sale of the property. It was in the custody of the law. Wilson, purchasing with full knowledge of the facts, cannot obtain relief from a contract as usurious, as he does not plead the same. *Ohio & M. R. R. Co.* v. *Kasson*, 37 N. Y. 218; *Connecticut* v. *Jackson*, 1 Johns. Ch. 14; *Kellogg* v. *Hickock*, 1 Wend. 521; *Sands* v. *Church*, 2 Seld. 347; *De Wolf* v. *Johnson*, 10 Wheat. 392; *Merrills* v. *Low*, 9 Cow. 65; *Beach* v. *Fulton Bank*, 3 Wend. 573; *Green* v. *Covilland*, 10 Cal. 317.

The court should have allowed Davis an attorney's fee. The referee reported the amount.

Respondent cannot show a case where the plaintiff, in an action to compel the specific performance of a contract to convey real estate, is relieved for any cause from part of the purchase-money and yet obtained a decree of title. Courts of equity do not make a contract for parties and enforce it against their will.

No insolvency is charged against Fredericks, and there is no necessity for interfering between Davis and Fredericks. It is not charged that Wilson is not amply secured, and the contracts cannot be carried out according to the intention of the parties.

W. F. SANDERS, WORD & SPRATT and G. MAY, for respondent.

No brief on file.

KNOWLES, J. Although exceptions were taken to the findings of the reports of the referees in this case, the testimony upon which they based their findings is not made a part of the record in this court. Hence we cannot review them; and they must stand as true. No exceptions appear

in the record to the findings of fact by the court below. These also then must stand as true. There are no specifications in the record of errors committed in rendering the decree by the court below. This, however, was not objected to by counsel for respondent; and waiving this objection the only points we can consider are those which appellants have presented in their brief, and which appear on the face of the records.

It appears from the findings of the court below, and the referees in this cause, that Davis contracted to sell Fredericks an undivided one-half of the Madison mills, together with the land upon which the same was situated, and all the appurtenances thereto attached, together with some personal property. That to secure the contract price for said property Fredericks executed and delivered to Davis his two promissory notes, one for flour and the other for gold dust, and to secure the payment of these executed and delivered to Perkins his deed of trust for the benefit of Davis on the said mill property.

Subsequent to this Fredericks contracted to sell, and did sell to Wilson an undivided one-half of said property; and in pursuance with said contract Wilson and Fredericks entered into the joint possession of said property.

Fredericks after this sale to Wilson confessed two judgments on the aforesaid promissory notes, in Meagher county, in favor of Davis. The court below set these two judgments aside as a fraud upon the rights of Wilson.

All title that Davis may have acquired to said property by virtue of a sale thereof under these judgments failed in consequence of the annulling the said judgments. The deed from Fredericks and wife to Davis the court also declared fraudulent and void. Appellants make no point upon these rulings in their brief. And if they did, there cannot be any doubt from the report of the referee, Blake, that sufficient does appear to have fully warranted the court in so setting the smaller of said judgments aside for that cause, and that defendant, Davis, was not in the least damaged by the setting aside of the other, as this court has held

that judgments bear only ten per cent interest; and as any rights Davis acquired to said property by a sale thereunder was in subordination to Wilson's rights. Davis knew of Fredericks' sale to Wilson; and hence as to his rights, the sale by Fredericks to him (Davis) was a fraud. It was an attempt by Fredericks to convey what he had parted with. All that is left for this court to consider then, is the rights of the several parties to this action under the contract of sale from Davis to Fredericks, the deed of trust to Perkins, and the contract of sale by Fredericks to Wilson. Considerable is said in the brief of appellants in regard to the right of Wilson to be subrogated to the rights of Davis.

The decree entered by the court below does not purport to do this. It allows Wilson to pay off the incumbrance against the joint property of Fredericks and Wilson. This is no novel right, but one which the law clearly guarantees. It also decrees that the amount paid by Wilson in excess of that paid by Fredericks shall be a lien upon their joint property. It would appear from the contract between Fredericks and Wilson, which is a part of this record, that these parties had been clearly partners, and that this property was partnership property. The law gives to each partner a lien upon the joint effects of the partnership for any excess over his partner which he has contributed to their joint business, and to preserve their joint property. It decreed that upon the payment to Davis of the amount for which he contracted to sell said property to Fredericks, together with five per cent interest per month thereon, without any interest upon interest, Davis should make a conveyance to Fredericks. Wilson having by law a lien upon whatever interest Fredericks had in said property, could properly demand of Davis a conveyance to Fredericks of an undivided one-half of said property, upon his receiving what he was legally entitled to under the contract to sell the same.

This brings us to the consideration of the question of how much Davis was entitled to receive of Fredericks, or his grantee, before he could be compelled to make a deed to said property. The note given by Fredericks, payable in

gold dust or its equivalent in United States treasury notes, to secure the payment of part of the purchase-money for said property, stipulated that the principal should bear five per cent interest per month, payable monthly; and that, if this interest should not be paid when it fell due, then this interest should bear the same rate of interest as the principal. The court below refused to allow this interest upon interest. This is assigned as error in appellant's brief.

It seems to be a well-settled principle, in courts of equity, not to allow interest upon interest where the contract to pay the same was made at the time of the original contract, and before any interest had become due, where the payee seeks to enforce such a contract, although a stipulation to that effect would not vitiate the original contract. *Selleck* v. *French*, Am. Lead. Cases, 534.

If Davis, then, would not be entitled to demand of Fredericks interest upon interest, if he sought to collect the same and to enforce his lien upon said property, there is no reason for requiring Fredericks or Wilson to pay him more than he could recover, before they could demand of Davis a cancellation of the deed of trust at least.

It is claimed, however, that it would be inequitable to compel Davis to convey his property for less than he had agreed to. That a court of equity *might* think it inequitable to compel Fredericks to pay compound interest, if Davis *sought* to collect the same, and, upon application, might relieve Fredericks of this contract as oppressive and unconscionable, but that they cannot say to Fredericks you need not pay what you agreed to, and, to Davis, you must convey your property for less than you agreed.

In law, what did Fredericks agree to pay Davis for this property, and what did Davis agree to convey it for?

Interest upon interest was not allowed at common law, although awarded by a special contract to that effect. Pars. on Bills & Notes, vol. 2, p. 391; *Rensselaer Glass Factory* v. *Reid et al.*, 5 Cow. 609.

It was considered a violation of the laws of God, and contrary to good conscience; although an English statute

was enacted, prohibiting all interest above a certain amount. This left it to parties to agree to any interest less than that amount.

It was thought better, perhaps, that a small interest should be collected legally, than that a large interest should be collected illegally and by evasive means. This statute, however, was never construed by the English courts as allowing compound interest in any amount. The current of English authorities are adverse to allowing compound interest. The only modification which this English statute of Henry the VIII, before referred to, made then in the common law, was to allow simple interest, when agreed to by the parties, for any amount, not to exceed ten per centum per annum. Thus stood the common law, I think, when this government became independent. The legislative assembly of this Territory have enacted, "That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this Territory, shall be the law and the rule of decision, and shall be considered as of full force, until repealed by legislative authority." See Laws of Montana Territory for 1864, p. 356.

This rule of the common law is certainly applicable, and of a general nature. If we turn to the American rule, in relation to this question, I think we must arrive at the same conclusion. In this country the right to collect interest has been made legal by usage and the decisions of the courts. Pars. on Bills & Notes, vol. 2, p. 392. And I may add, in some States by statute. Only such interest should be allowed, then, as is warranted by usage and legal adjudications, or by statute. I think I am safe in saying, that no universal custom exists throughout the United States to allow compound interest. Many of the States have enacted special statutes, prohibiting it. Hare and Wallace, in their notes to the case of *Selleck* v. *French*, Am. Lead Cases, 533, say, that the better opinion is, that at law compound interest should be allowed.

Parsons on Bills & Notes, vol. 2, p. 424, says, that, in the

present state of the authorities, it can hardly be supposed that a bargain for compound interest would be enforced.

In the case of *Cox* v. *Smith et al.*, 1 Nev. 169, the court says that it could find but two cases where courts of law had allowed compound interest, and one of these was afterward overruled. That in New York and Massachusetts the current of authorities are all against it.

It will be seen by these authorities that there is a conflict of opinion upon this subject in the United States. Whichever way the preponderance of authority may be, the means afforded me for the investigation of the subject will not warrant me in saying. I am sure, however, that the current of American authorities have not been so general as to warrant any one in saying that the old common-law rule has been set aside, and an American common law established upon this subject. It is conceded, everywhere, that the rule in equity courts is adverse to the allowing of such interest.

This is an action in equity. Whatever may have been the reasons that induced equity courts to refuse to allow compound interest, they have declared that such interest is illegal; or, in other words, courts of equity have held fast to the common-law rule upon this subject, and in nowise have changed it; and we must hold that such is the law, unless it has been changed by the statutes of this Territory.

The third section of the act upon interest, in this Territory, reads as follows: "The parties to any bond, bill, promissory note or other instrument of writing, may stipulate therein for a greater or higher rate of interest than ten per cent per annum, and any such stipulation contained in any such instrument of writing may be enforced in any court of law or equity of competent jurisdiction in this Territory."

This evidently contemplates simple interest. If the statute had said, parties to written instruments should not stipulate for any higher or greater rate of interest than ten per cent per annum, the same question as to compound interest would be left open. Compound interest is interest upon interest. The rate of interest which the law may allow

does not affect this question. In the case of *The Rensselaer Glass Factory* v. *Reid*, 5 Cow. 609, Senator Spencer says: "That in New York the statute on interest is negative, prohibitory of interest being taken above a certain rate." It does not, in terms, prohibit compound interest; yet, both the courts of law and equity have held, in that State, that, though this statute authorized parties to agree to any rate less than that prohibited, it did not authorize agreements on compound interest.

The case of *Cox v. Smith et al.*, 1 Nev. 169, holds that a statute of Nevada, similar to this one, does not warrant compound interest.

And, as before remarked, the statutes of England are only prohibitory of certain interest above a certain rate, and left it to parties to agree to a less rate of interest, and, in terms, did not prohibit compound interest; yet, the current of English authorities is adverse to allowing any thing but simple interest, when, as in this case, the contract was made at the time of the original contract. The term, rate per cent, whether used at common law or in statutes, so far as I have been able to learn, signifies so much per cent on the principal. That term, used in this statute, must be so construed.

It is then determined that compound interest is not warranted by law. Parties who make contracts are presumed to know the law, and that they make their contracts in direct reference to it. Davis and Fredericks it must be considered, then, knew the law did not allow compound interest, and that the agreement made therefor was not warranted by law, and would not be enforced.

Davis, then, in contemplation of law, did not contract to sell his one-half of said property for any more than the amount specified in said notes, together with simple interest on the gold dust note. There was nothing then inequitable in compelling him to convey this property for the full amount of said notes, together with simple interest on the gold dust note, as per agreement therefor. I do not think it was necessary for Wilson to set forth that this transaction was tainted with compound interest, and ask relief there

from in this action. The same principle is not involved as in usury. For the taking of usury, the statute generally appends some penalty. The statute which creates this penalty must be set up before the penalty can be exacted. Here, however, the question was presented to the court: How much was Davis legally entitled to recover?

It appeared upon the face of the note that it contained a contract for compound interest.

It certainly could not have been necessary for plaintiff to point out this fact to the court. It certainly could not be presumed that a court could not observe this fact without it was specifically pointed out to it by an allegation in the pleadings. It is a well-known rule in pleadings that a party may allege facts which show that he is not entitled to recover. Had Davis been paid all that he was entitled to, and had he brought a suit for the compound interest agreed to be paid, and the complaint expressed this, it would not have been necessary for Fredericks to have filed an answer, setting up that it was compound interest.

A general demurrer to the complaint would have raised the issue, whether he was legally entitled to recover it, setting forth that the complaint did not state facts sufficient to constitute a cause of action. The defect would be one of such a nature, that even a failure to demur would not waive it. It could be raised at any time, for it would show upon its face that there was no legal consideration to support the agreement to pay it.

In this case, the part of the contract which stipulates for compound interest is capable of being separated from the rest of the contract, and as to this the court was warranted in saying there was no legal consideration to support it. There is one thing to be noticed in this action. Davis does not ask to be relieved from the contract to convey, if he cannot receive compound interest, but stands upon his contract, and asks for the complete fulfillment of it before he conveys. The case might present a different phase, if Davis should have asked to be relieved of the contract, and had tendered what he had received thereon. There is nothing

in the point that Davis did not receive proper notice of Wilson's intention to pay off said notes. Long before the pleadings were filed, upon which the case was finally tried, the record shows that these notes had become due. The notice required by the contract, between Davis and Fredericks, was to be given before the notes became due. Appellants complain because Perkins was not allowed to retain possession of the property. This might have been a joint cause of complaint, on the part of both Davis and Perkins, before the final adjudication in this matter, and the decree of the court, giving Davis all his legal rights. When the court had provided for the payment of the debt to Davis, and the cancellation of the deed of trust, it could not provide any thing in relation to the restoration of the possession of said property by Perkins, in accordance with the terms of said deed of trust.

The decree of the court, ordering the sale of the property in controversy, before Davis was paid the full amount the court found due against him, was perhaps a little irregular as to Davis, yet, the irregularity is not one that should occasion a reversal of the decree.

The decree in no instance orders Davis to convey the interest held in his name until he received the full amount due him, and the sale of the property could in no manner affect his rights.

It made no difference with Davis from what legal source he was paid the amount due him. The court might have reasonably inferred that the small amount it had found due Davis would surely be paid out of the sale of this property, upon which he had the deed of trust, and that it was not necessary that the cause should remain longer in litigation. As it treated the answer of Davis as a cross bill, the sale of the undivided one-half of said property for that purpose was certainly proper. As between Fredericks and Wilson it was proper that this property should be sold. The appellants complain that by the articles of partnership between Fredericks and Wilson, the excess of funds either contributed to the firm was to be paid by the company out of the net earnings of the mill. From the find-

ings of the court it would appear that, in pursuance of the articles of copartnership, Fredericks and Wilson conducted, for some time at least, the business for which the partnership was formed. There was no issue presented in the pleadings that required the court to find whether or when this partnership had been terminated, if at all. It would seem that the plaintiff in his pleadings regards the partnership terminated, and Fredericks alleges in his answer that it was never formed.

Taking the findings of the referee, Hedges, and those of the court, in connection with the articles of copartnership, which are a part of the record made so by Fredericks, there cannot be much doubt but that for a time the partnership did exist. The court may, however, have properly considered that the partnership had been terminated before the commencement of this action.

There was no time specified for the duration of the partnership. Either party could terminate it by giving proper notice, or the termination might be inferred from the conduct of the parties. Story on Part. 272.

There was enough in the conduct of Fredericks to justify the court in taking the view that the partnership had been dissolved. When the partnership was dissolved the stipulation above referred to was annulled. Fredericks, while refusing longer to continue the partnership, cannot demand of Wilson to carry out the stipulations of the articles which made the copartnership. When the partnership was dissolved no company, in accordance with this stipulation, was left to pay Wilson for his advances out of the net earnings of the said mill. As far as Fredericks and Wilson are concerned, the court undoubtedly treated this as an action to wind up the affairs of the partnership which had already been dissolved, and to give each his due rights in the partnership assets. This could be done only by a sale of the property belonging to the firm, which is the usual practice of courts of equity in such cases.

Appellants also claim that Davis should have been allowed a reasonable attorney's fee in collecting what the court

found due him. The only allegation in defendant Davis' answer, or cross-bill, which would warrant the court in awarding the same, is the one after he had alleged the amount due him on the notes for the sale of said property, which is as follows: "Besides the sum of six thousand five hundred dollars damages, and expenses incurred in attending to and protecting the rights, remedies and equities of said Davis in and about the premises which said Fredericks stipulated and agreed to pay and refund to said Davis, before said Davis was required to make a deed to said property."

In the first place this allegation is not specific enough to warrant the court in awarding any damages or any remuneration for expenses. It would be necessary for the answer to show wherein Davis had been damaged, and also what expenses and costs he had incurred in protecting his rights. It is not enough for a man to say he has incurred costs and expenses in protecting rights. What the law requires of a party is to show for what he had incurred these expenses and costs. The terms "rights," "remedies" and "equities" have no such determined meaning in a pleading as goods, wares, merchandise and chattels.

In the next place the replication to this answer does purport to put in issue this allegation, and although the denial may be said to be defective, perhaps, no objection was taken to it, however. Hence, if the court failed to find upon this issue, it will be supposed that Davis failed to establish it.

This court cannot now consider whether or not the order of sale of the court was stayed by the bond filed. What this court is required here to determine is, whether or not the decree of the court below should be affirmed.

Decree of the court below is affirmed.

Exceptions overruled.

AYLESWORTH, respondent, *v.* REECE et al., appellants.

CASE AFFIRMED RELATING TO JURY LAW. The case of *Kleinschmidt* v. *Dunphy*, *ante*, p. 118, deciding that three-fourths of a jury cannot find a verdict in common-law actions, where the value at controversy exceeds $20, affirmed.

Appeal from the First District, Madison County.

THIS action was tried by a jury in the district court, in May, 1869, and nine of the jury returned a verdict for plaintiff, for $800. Three jurymen dissented. The court, WARREN, J., entered judgment on the verdict, and defendants appealed.

The decision upon one exception renders unnecessary a statement of the facts.

H. N. BLAKE, for appellants.

WORD & SPRATT, for respondent.

SYMES, J. This was an action for damage for breach of contract, plaintiff alleging that defendants, in consideration that he would build an arastra for crushing quartz, agreed to deliver to him one hundred tons of good gold bearing quartz; that he built the arastra, but defendants failed to deliver the quartz.

Defendants denied the allegations of the complaint. The case was tried before a jury at the May term of the Madison county district court, and a verdict found for the plaintiff for $800, which verdict was signed by nine jurymen only. Judgment was rendered on the verdict, and the defendants excepted to the verdict and judgment, for the reason that it was not the verdict of twelve men but of nine.

The question presented is, whether the judgment is erroneous, being rendered on a verdict of nine jurymen, and no consent of parties that the case should be tried by less than twelve. This court has decided in the case of *Kleinschmidt et al.* v. *Dunphy et al.*, that so much of the law

of 1869, passed by the legislative assembly, as provides that three-fourths of a jury may find a verdict in common-law actions, is unconstitutional and void.

The judgment must be reversed, and cause remanded for new trial.

Judgment reversed.

COMANCHE MINING COMPANY, respondent, *v.* RUMLEY *et al.*, appellants.

PRACTICE—*judgment entered at succeeding term.* Judgment can be entered on a verdict at a term of the court succeeding that in which it was found by the jury, if the clerk has failed to enter the same.

PRACTICE—*judgment—court can amend.* The court can amend a judgment at a term succeeding that in which it was entered, by inserting the names of the defendants that were specified in the verdict.

PRACTICE—*judgment against defendants individually.* Judgment can be entered against defendants individually, who are named and described in the complaint as a certain company, although they are not members of it, if the jury finds that they are liable individually.

Appeal from the Second District, Deer Lodge County.

TEN persons, who described themselves individually and as doing business under the style of the Comanche Mining Company, commenced this action on February 25, 1868, against "C. Rumley, Louis Bugher, Peter Rea, H. Comly and other parties unknown to these plaintiffs, who are doing mining business under the firm name and style of the Rumley and Bugher Mining Company," in the district court for Deer Lodge county. On October 8, 1868, Peter H. Rea and Harry R. Comly filed an answer. Rumley and Bugher also answered on the same day.

The cause was tried in May, 1869, and the jury returned the following verdict, which was filed by the clerk of the court on May 26, 1869.

"John Edwards, Daniel Brown, Duncan Cameron, George Caulderwood, Benjamin Franklin, Nathaniel Heil, H. P

Drennin, Homer Cogswell, Emanuel Brown, John Gerber, who are doing a mining business under the firm name and style of the *Comanche Mining Company*, plaintiffs, v. *C. Rumley*, *Louis Bugher*, *Peter Rea* and *H. Comly*.

We, the jury, find for the plaintiffs and against the defendants for the possession of claims Nos. one (1), two (2), three (3), four (4) and five (5) west from discovery, together with discovery claim and claim No. one (1), east from discovery, on the Comanche Extension Lode, as described in plaintiff's complaint, and assess their damage at one ($1) dollar."

The jury also returned their findings upon fourteen issues, which were submitted by the court, and found that the Rumley and Bugher Mining Company was composed of C. Rumley and L. Bugher.

At the next term of the court, in September, 1869, the following judgment was entered on the verdict:

"TERRITORY OF MONTANA,
DEER LODGE COUNTY.

"*In the Second Judicial District Court:*

"COMANCHE MINING COMPANY *v.* RUMLEY AND BUGHER MINING COMPANY.

"This cause having been tried before KNOWLES, J., and a jury, as to certain issues of law and fact, having been argued, and a verdict of the jury having been returned in favor of said plaintiffs.

"Wherefore, it is adjudged that the said Comanche Mining Company, plaintiffs herein, recover of the defendants, the Rumley and Bugher Mining Company, the possession of (description of the property), and, further, that the plaintiffs recover of the defendants the sum of $1 damages for the withholding thereof, and also $1,381.05 costs of this suit, amounting, in whole, to $1,382.05.

"H. KNOWLES, *Judge*."

At the next term of the court, in December, 1869, the plaintiffs moved to amend the foregoing judgment, by

inserting the names of the plaintiffs and defendants, and charging the amount of the costs. The motion was sustained by the court, KNOWLES, J., and the judgment was entered on December 24, 1869, for Edwards and the other plaintiffs, naming all of them, and against C. Rumley, Louis Bugher, Peter Rea and H. Comly, for the possession of the property in controversy and $1,289.05.

At the trial of the cause, the attorneys stipulated in writing that all the instructions of the court should be deemed duly excepted to.

The defendants Rea and Comly appealed from the judgment and amended judgment.

WOOLFOLK & TOOLE, for appellants.

The defendant is sued as a company. The appellants take issue and deny that the company is composed of Rea, Comly, Rumley and Bugher. The jury find that Rumley and Bugher composed the company. No judgment could be rendered except against the company. The court, without notice to, or the appearance of, Rea and Comly, rendered judgment against them. The court lost jurisdiction of the defendants, and cause, after the May and September terms had adjourned. The judgment in December, 1869, is not an amendment as to appellants. The original decree included all the members of the company, against whom the action was brought. If the respondents were dissatisfied with the original decree, this court should have corrected it. 1 Estee's Pl. 30. 57.

No judgment was entered within the time prescribed by law. *Leviston* v. *Swan*, 33 Cal. 483; *Wallace* v. *Eldredge*, 27 id. 495; *Bell* v. *Thompson*, 19 id. 708; *Swain* v. *Naglee*, 19 id. 127; *Branger* v. *Chevalier*, 9 id. 351; *Morrison* *Dapman*, 3 id. 255.

The court erred in its instructions.

MAYHEW & MCMURTRY, for respondents.

The court had jurisdiction over the cause, and all defendants appearing in the record at any subsequent terms, after

the May and September terms of court. If the judgment was defective as to parties, the court had authority to order the judgment amended, and cure defects or omissions. *Swain* v. *Naglee*, 19 Cal. 127; *Leviston* v. *Swan*, 33 id. 480; *Browner* v. *Davis*, 15 id. 9.

A court can amend a judgment as to parties, amounts of money, etc., when the record discloses what the actual judgment should be. *Close* v. *Gillispie*, 3 Johns. 526; *Mechanics' Bank* v. *Minithorn*, 19 id. 245; *Lee* v. *Curtis*, 17 id. 85.

SYMES, J. This was an action for the recovery of certain quartz lodes and damages for detention. The cause was tried at the May term of the Deer Lodge district court, and a verdict found for the plaintiff, for possession of the property claimed, and one dollar damages. No judgment was rendered at said May term on the verdict. At the following September term a judgment was rendered against two of the defendants, Rumley and Bugher; and at the following December term, 1869, the judgment was amended by the court and rendered against all the defendants, Rumley, Bugher, Rea and Comly. The case comes up on appeal from the judgment roll, there being no statement, and the real question to consider is, did the court err in rendering judgment on the verdict at the next term, and in amending or changing the judgment and rendering it against the other two defendants at the next following term.

The suit was against four defendants, naming them personally, and describing them as the Rumley and Bugher Mining Company. The verdict named all the plaintiffs individually, and all the defendants individually, and found against them all for the possession of the quartz claim and one dollar damages. The clerk neglected his duty as prescribed by the 197th section of the Civil Code, and did not, within twenty-four hours, enter judgment on the verdict.

The authorities are plain to the effect, that the court can, after the term has expired, correct an error appearing on the judgment-roll or from the face of the papers, when it is a

clerical error, or one arising from neglect of an officer of the court. In *Close* v. *Gillispie*, 3 Johns. 527, the court say there can be no doubt that an amendment was proper, when judgment had been entered on a warrant of attorney, and the attorney had neglected to sign the plea, and his name was not inserted in the roll; and cite a case where an amendment, *nunc pro tunc*, was allowed after lapse of several terms, where the clerk who taxed the costs had neglected to sign the roll; also refer to an English case, where the court allowed amendments, rendered necessary by neglect of attorneys, saying that attorneys were officers of the court. In the case of *The President and Directors of Mechanics' Bank* v. *Minithorn*, 19 Johns. 245, the court say they have no doubt of their power to set aside a satisfaction of a judgment, and allow another computation of the amount due and amendment of the judgment, when it appeared that the mistake was one of the clerk of the court, and the amendment was ordered. The cases of *Swain* v. *Neglee*, 19 Cal. 127, and *Leviston* v. *Swan and others*, 33 id. 485, are to the same effect. In the latter case the decree did not mention who was liable for the deficiency, so the clerk could not, on the coming in of the sheriff's report on foreclosure sale, enter up judgment for the deficiency; and the court allowed the amendment by inserting the name of the party liable for the deficiency after the term when judgment was rendered.

Under these authorities it is clear that the court below had the power to render judgment at the next term on the verdict, when the clerk had neglected to do so; and to thereafter amend the judgment by inserting the names of all the defendants named in the verdict of the jury.

Appellants contend that the court erred in rendering judgment at any time against Rea and Comly, because all the defendants were sued as a company, and the jury, by a special finding, found that Rea and Comly were not members of the company. But the defendants were all sued by name for ouster of possession and trespass to property; the additional allegation that they were a company, and de-

scribing them as such, cannot affect the verdict or judgment when the jury found them all individually guilty of the acts complained, in the general verdict, although some of them were found not to be members of the company.

Appellants further except to the ruling of the court, in refusing some instructions offered by defendants. All the law applicable to the case seems to be contained in the instructions given by the court on its own motion, and at request of plaintiffs. Those refused are in effect a repetition of others given, or are based on the theory that defendants could obtain affirmative relief in the action.

The judgment below is affirmed.

Exceptions overruled.

DAHLER, appellant, *v.* STEELE, respondent.

REPLEVIN—*property returned if action is dismissed.* A judgment for costs and the return of property is properly rendered against a party who dismisses his action for the recovery of the possession of the property, after he has obtained the same by means of the process of the court in the action.

DISMISSAL OF ACTION—*a final judgment.* The dismissal of an action is, in effect, a final judgment against the plaintiff, although he has the right to bring a new action for the same subject-matter.

Appeal from the Third District, Lewis and Clarke County.

DAHLER commenced this action on February 1, 1870, in the district court, against Steele, who was then the sheriff of Lewis and Clarke county, to recover the possession of certain personal property valued at $4,750, and also $500 damages for its wrongful detention. The affidavit and undertaking required by law were filed, to enable the officer to take the property from Steele. After the defendant had demurred to the complaint, the plaintiff issued the following order to the clerk of the court: "The clerk will please dismiss the above cause at the costs of the plaintiff."

After the court had taken the matter of dismissal under advisement, the plaintiff filed the following motion:

"Now comes the above plaintiff by his attorneys, Woolfolk & Toole, and moves the court to order the same dismissed." * * *

The court, SYMES, J., then ordered the cause to be dismissed at the plaintiff's costs, and that the property in controversy be returned to the defendant by the plaintiff. The defendant excepted to the order requiring the return of the property.

WOOLFOLK & TOOLE, for appellant.

The appellant had a right to dismiss his suit at any time, before trial, on paying costs, there being no counter-claim. The court had no power or jurisdiction, after the precipe for dismissal had been filed with the clerk, to retain appellant in court against his will, and adjudicate upon his rights. Civil Prac. Act, § 148; *Hancock D. Co.* v. *Bradford*, 13 Cal. 637; *Brown* v. *Harter*, 18 id. 77; *Reed* v. *Calderwood*, 22 id. 463; *Dimick* v. *Deringer*, 32 id. 488.

The court erred in making the order for the return of the property, upon a dismissal of his suit by appellant. This should be determined in an action upon the replevin bond Civil Prac. Act, § 102; *Mills* v. *Gleason*, 21 Cal. 274.

CHUMASERO & CHADWICK, for respondent.

The complaint does not state facts sufficient to constitute a cause of action. It should allege a right of possession, and the facts which entitle the appellant to the possession. It should allege the ownership of appellant, or his special property, if he has such. *Pattison* v. *Adams*, 7 Hill, 126.

A party cannot commence an action of replevin, and, after having thereby obtained possession of the property, discontinue his action, without placing the defendant *in statu quo;* and, in said case, the defendant is entitled to a return of the property. *Wilson* v. *Wheeler*, 6 How. Pr. 50; Morris on Replevin, 114; Voorhies' Code, 390, note *g;* 1 Whit. Pr. 248.

The whole proceedings in this case were radically defective from the commencement, and a fraudulent advantage

has been acquired under color of law. The court below properly decided that this advantage could not be retained.

KNOWLES, J. The appellant, Dahler, brought an action to recover the possession of certain personal property from the defendant, Steele. There is nothing in the record which shows that Dahler ever obtained possession of this property. The cause, however, was argued by counsel as though this was the fact, and, as every presumption of this court must be in favor of the ruling of the court below, it will be considered that such was the case. The appellant must present record enough to clearly show error. If such was not the case, it devolved upon him to show it. The appellant, after he had acquired possession of this property by means of the process of the court, moved the court to dismiss the action at his costs. This was granted, and, on application of the attorneys for respondent, an order was entered that the appellant return this property to the respondent. The ruling of the court below, in awarding this order to respondent, is assigned as error.

The means afforded the plaintiff by the Code of obtaining possession of personal property pending an action therefor, is as much an auxiliary remedy as arrest, attachment or injunction. When the original remedy fails, the auxiliary remedy involved in aid thereof becomes extinct. It is true a party may dismiss a cause upon the payment of costs. The necessary result, however, of this must follow. All remedies invoked in aid of it must go with it.

It is the object of courts when a cause is dismissed, as far as they can, to put the defendant in the same condition he was before suit. Hence, his costs are awarded him. If he has been arrested, he is released. If an injunction has been awarded, it is dissolved, and he permitted to perform the acts, from the doing of which he was restrained. See *Dowling et al.* v. *Palack et al.*, 18 Cal. 625. If an attachment has issued, the defendant is entitled to a return upon making a demand of the officer. Drake on Attach., §§ 285, 381–383.

Undoubtedly, the only reason why the defendant is not awarded a judgment, for the return of his property in attachment cases, is, because the officer is not a party to the action. It would seem that, in an action to recover the possession of personal property, something more than costs ought to be awarded. The plaintiff has obtained the possession of the defendant's property, by means of a remedy which, by the dismissal of the original action, becomes extinct. He is a party to the action, and if the rule is to be followed that the defendant is in such cases to be put in as good a condition as he was before the suit, if within the power of the court, I cannot see why a return of the property should not be awarded. If the court can prevent it, a plaintiff ought not, in such a way, to be permitted to recover any advantage.

The dismissal of this action was in effect a final judgment against the plaintiff therein. As between the parties thereto, as far as it is concerned, it stands as though all the issues offered in the complaint had been found for the defendant, although it may not affect their right to bring a new action, involving the same subject-matter. See *Leese* v. *Sherwood*, 21 Cal. 151, and *Dowling et al.* v. *Palack et al.*, 18 id. 625.

If this cause had been tried and all the issues found for the defendant, there would be no doubt but that the defendant would be entitled to a judgment for a return of the property. Yet, as we have seen, this was the very effect, as far as this action was concerned, of the dismissal on the part of the plaintiff. In all such cases, I think, the judgment of the court ought to be, that the defendant have judgment for costs, and for a return of the property, if asked.

The judgment of the court below is therefore affirmed, with costs.

Exceptions overruled.

DAVIS, appellant, *v.* GERMAINE, respondent.

AGREEMENT—*objections not regarded without a statement.* This court will not regard objections that a verdict is against law and evidence, if there is no settled statement.

PRACTICE—*objection not considered without an exception.* This court will not consider an objection that oral instructions were given to the jury contrary to the statute, if no exception was properly taken at the time.

AGREEMENT—*waiver of condition.* An agreement cannot be rescinded by the failure of a party to perform a condition which has been waived.

Appeal from the Third District, Lewis and Clarke County.

DAVIS filed his amended complaint in the district court, on October 13, 1869, and demanded judgment against Germaine for $5,000, and interest for money loaned and advanced under a contract. The complaint alleged that the times, when this money was to be loaned and advanced under the written contract, were changed and altered at the special request of defendant. The defendant answered in March, 1870, and denied that the times referred to in the contract were altered at his request, and alleged that, under the contract, the money sued for was not due until eighteen months after June 9, 1869.

The cause was tried in March, 1870, and the jury returned a verdict for the defendant. The court, SYMES, J., gave written and oral instructions to the jury. At the sixth session of the legislative assembly, which was concluded on January 7, 1870, a law was passed which required instructions in the trial of any cause to be in writing. No attorney called the attention of the court to this law, and no exception was taken to the action of the court in charging the jury orally.

The plaintiff's motion for a new trial was refused by the court, SYMES, J., and plaintiff appealed.

CHUMASERO & CHADWICK, for appellant.

The court erred in giving the oral and written instructions to the jury. 2 Pars. on Cont. 184–186

The oral instructions were so given in violation of the statutes of the Territory.

The verdict is contrary to law and evidence.

WOOLFOLK & TOOLE, for respondent.

Appellant is limited to the grounds set forth in the motion for a new trial. *McCloud* v. *O'Neall*, 16 Cal. 392; *Pierce* v. *Jackson*, 21 id. 636.

The written instructions are not assigned as error in that motion. The alleged error of the court, in charging the jury orally, was not saved by exception. *More* v. *Del Valle*, 28 Cal. 174. Unless so saved, it is not available on motion for a new trial. *Letter* v. *Putney*, 7 Cal. 423; *People* v. *Ah Fong*, 12 id. 345; *McCartney* v. *Fitz Henry*, 16 id. 184; *Hicks* v. *Coleman*, 25 id. 146.

It is questionable if the statute requires the instructions to be in writing.

The oral charge was correct. 2 Pars. on Cont. 672, 673; *California* v. *McCauley*, 15 Cal. 429.

If erroneous, the appellant could not be injured by it. 3 Estee's Pl. 740.

WARREN, C. J. The grounds of the motion for a new trial in this cause were, 1. Insufficiency of the evidence to justify the verdict, and that it is against law. There is no statement settled as required by law, and hence we cannot consider the objection. 2. That the court instructed the jury orally. If this be a fact, it has not been properly preserved by exception taken at the time, and is not presented in the record. 3. That the said oral instruction is erroneous, and misled the jury.

The complaint sets out a written agreement between the parties, and avers a subsequent modification of its terms, made at the instance of defendant, and alleges the performance of the contract on his part, and failure on the part of defendant. The answer, in effect, admits the execution of the agreement and its subsequent alteration, but denies, simply, that such alteration was made at defendant's request; avers performance by himself, and failure on the

part of plaintiff to perform the agreement. The contract being an entire one, the only issue presented was, as to the compliance of the respective parties with the terms of their agreement as finally made and acted on; and the court for failure of defendant to comply with the condition properly instructed the jury, in substance, that, if the plaintiff waived the terms of the agreement in the particular mentioned, he could not afterward rescind the contract for failure of defendant to comply with the condition waived. 4. That the instructions given at the request of defendant are erroneous.

We see no error, in the instructions given, sufficient to disturb the verdict.

The judgment is affirmed.

Exceptions overruled.

KNOWLES, J., dissented.

HARRIS, respondent, *v.* SHONTZ et al., appellants.

ACTION FOR DIVERSION OF WATER—*practice—judgment on verdict on the material issue.* In an action to recover damages for the diversion of water and obtain a decree of title and perpetual injunction, the verdict of the jury that plaintiff is entitled to the water is a finding on the material issue, and entitles him to a judgment for costs and the relief sought.

DAMAGES—*injunction.* In this case a perpetual injunction was properly decreed, although the jury did not assess any damages.

PLEADING—*insufficient denial.* A denial that defendants "wrongfully and illegally" diverted certain water, is an admission of the act of diversion.

Appeal from the First District, Madison County.

THIS action was commenced in May, 1869, against Shontz and three other parties, to recover judgment for $500 damages for the diversion of water claimed by him in Washington gulch, Madison county; that defendants be perpetually enjoined from diverting the same, and for general equitable relief. The defendants answered, and prayed for a dissolution of the temporary restraining order, and that defendants be adjudged the owners of, and entitled to, the use of the water.

The cause was tried in November, 1869, by a jury, that

returned the following verdict: "We, the jurors, do find the plaintiff entitled to one hundred and fifty inches of the water in Washington gulch." The defendants objected to the entry of the verdict, and the court, WARREN, J., over ruled the objection.

The defendants then moved for judgment on the verdict, because the finding of the jury was upon an immaterial issue and insufficient, and no damages were assessed for plaintiff. The defendants also moved to tax the costs of the action against plaintiff, because he had not recovered any damages. The court, WARREN, J., overruled both motions, and defendants excepted.

WORD & SPRATT, for appellants.

This is an action of trespass. The respondent should prove, and the jury should find, that the property was in the possession of respondent at the time of the alleged injury — rightfully as against appellants — and that the injury was committed by appellants by force. 2 Greenl. Ev., § 613; 3 Phil. Ev. 497–501; *Brennan* v. *Gaston*, 17 Cal. 373; *Pico* v. *Colimas*, 32 id. 580.

The verdict does not reach any material matters put in issue in this case. It is no verdict. The finding is upon an immaterial issue, and should be disregarded. *Benedict* v. *Bray*, 2 Cal. 251; *Truebody* v. *Jacobson*, id. 285; *Woodson* v. *McCune*, 17 id. 304; 12 Wend. 475.

The court below went beyond the verdict, and corrected it, in its judgment, by granting a perpetual injunction, and finding that respondent had a prior right to the water in controversy. The finding of the jury is a proposition of law, to be arrived at from the existence of certain facts. The jury found none of these facts, and there was nothing to authorize the judgment rendered. *Ross* v. *Austill*, 2 Cal. 183.

No special issues were submitted to the jury, and no general verdict was rendered. The right of trial by jury was denied appellants. The court usurped their province, and rendered judgment without a verdict.

The court below should have rendered judgment in favor of appellants for costs. Civ. Prac. Act, §§ 470, 473.

The decisions cited by respondent regarding the admission, in the answer, of the material allegations of the complaint, do not apply to this case. The court below did not so think, and it ordered a jury to try the issues. The answer contains sufficient denials. A verified answer, which contains a distinct denial of any fact material to plaintiff's recovery, cannot be treated as a nullity. Appellants have sufficiently denied all material allegations that were properly pleaded by respondent. *Ghirardelli* v. *McDermott*, 22 Cal. 539; *Hill* v. *Smith*, 27 id. 476; *Siter* v. *Jewett*, 33 id. 92.

Respondent should have tested the sufficiency of the denials by a motion for judgment upon the pleadings, or to strike out the answer. *Gay* v. *Winter*, 34 Cal. 153. Respondent submitted no such motion, but filed a replication.

The case was submitted to a jury, who rendered a verdict upon an immaterial issue, if it can be called an issue.

H. N. BLAKE, for respondent.

Appellants' answer consists of conjunctive denials. They are insufficient, and admit the material allegations of the respondent's complaint. *Woodworth* v. *Knowlton*, 22 Cal. 168; *Fish* v. *Redington*, 31 id. 194, and cases cited; *Fitch* v. *Bunch*, 30 id. 211.

The only points in controversy appear to be the capacity of respondent's ditch, and the right to the water in Washington creek. Upon these issues the jury rendered a verdict in favor of respondent. The court must ascertain the intention of the jury from the verdict, and carry the same into effect by its judgment thereon and the admissions in the pleadings. *Truebody* v. *Jacobson*, 2 Cal. 284; *McLaughlin* v. *Kelly*, 22 id. 222; *Brunett* v. *Whitesides*, 15 id. 37; *Treat* v. *Laforge*, id. 41.

The court below rendered a proper judgment in this case by making the temporary injunction perpetual. *McLaughlin* v. *Kelly*, 22 Cal. 222; *Hutton* v. *Reed*, 25 id. 491; *American Co.* v. *Bradford*, 27 id. 364.

A complaint for an injunction is good, without any prayer for damages. It is an equitable remedy to prevent future injuries. Damages are given to compensate a party for past injuries. Civ. Prac. Act, § 112; *Toulumne Water Co.* v. *Chapman*, 8 Cal. 392; *Sherman* v. *Clark*, 4 Nev. 138.

This was a special proceeding in the nature of an action and respondent was entitled to costs. Civ. Prac. Act, §§ 470, 472; *Marius* v. *Bicknell*, 10 Cal. 222.

SYMES, J. This was an action for damages for the diversion of water, and asking for a decree of title and perpetual injunction. Plaintiff alleged that he was the owner of certain mining ground and a water ditch, which conveyed two hundred inches of water to the same; that he had a prior right to the water; that defendants wrongfully diverted the said water to plaintiff's damage $500; that defendants threatened to continue the diversion, which would cause great and irreparable injury to plaintiff, and were unable to respond in damages.

Defendants answered and denied the ownership of the ditch, and prior rights to the use of the water; denied that plaintiff had sustained damage in any sum; denied that diversion would cause irreparable injury. Further answered and set up title in the water by right of appropriation and agreement of defendants.

The case was tried at the November term, 1869, and the following verdict found for the plaintiff, viz.: "We, the jurors, do find the plaintiff entitled to one hundred and fifty inches of the water in Washington gulch." The court on this verdict rendered judgment for costs against the defendants, and decreed the title to one hundred and fifty inches of water in the plaintiff, and perpetually enjoined the defendants from interfering therewith.

The defendants excepted to the entry of judgment and decree on the verdict, moved for a new trial, which motion was overruled, and appealed to this court.

Does the verdict or finding of the jury in this case support the judgment and decree? The jury find for the plaintiff upon the material issue of title to the water. There is

no denial that defendants did divert, continue to divert, and threatened to continue to divert the water. The paragraph of the answer purporting to deny the diversion is as follows, *to wit:* "Denies that the said defendants and their servants and employees did on said 1st day of April, 1869, and ever since said date, have continued, *wrongfully* and *illegally*, to divert the water of said Washington creek by means of a certain ditch owned and possessed by defendants." Denying that they diverted it wrongfully and illegally is pregnant with the admission that they did in fact commit the act of diversion. The allegations of irreparable injury and insolvency were not necessary to be found by the jury. The plaintiff set up title to water, and asks that title be decreed to him; and alleged that defendants diverted and threatened to divert the same. The trespass complained of, the diversion of the water, the continuing and threatened continuance thereof, not being denied, the admissions in the pleading and the finding of the jury will support the judgment and decree. The title to the water being found in the plaintiff, and the defendants' admission that they threatened to continue to divert it, entitled the plaintiff to a decree of title and injunction.

The defendants objected to the judgment for costs being entered because the plaintiff did not recover $50 or more damages. The gist of the action appears to be the title, or prior right to the use of the water; the diversion is admitted by defendants, but they deny the title to the water; upon this issue alone the cause was tried, and the plaintiff's recovery of the water entitles him to costs.

Order of the court overruling motion for new trial is affirmed.

Exceptions overruled.

LINCOLN et al., appellants, *v.* RODGERS et al., respondents.

PRACTICE — *new trial — not granted if verdict has any support.* A new trial will not be granted if there is some testimony to support the verdict, although there is a preponderance of evidence against it.

MINING CLAIMS — *damages by custom — free tailings.* The first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch, and render valueless the mining claims of subsequent locators below them.

MINING CLAIMS — *no remedy for necessary injuries in working by first locators.* The first locators of mining ground can work it with reasonable care and diligence, and the necessary injuries resulting to subsequent locators would be *damnum absque injuria.*

MINING CLAIMS — *boundaries of ground for tailings — custom — free tailings.* The boundaries of ground for the deposit of tailings must be distinctly defined by persons locating it, so that subsequent locators may know what ground is vacant. The custom of free tailings conflicts with this rule, and the defining of such boundaries would be useless.

Appeal from the Second District, Deer Lodge County.

THIS action was commenced by Lincoln and another in the district court, in April, 1869, to recover $3,000 damages, and enjoin defendants from washing down on plaintiffs' mining claims, tailings, gravel and sand. The cause was tried at the September term, 1869, by a jury that rendered a general verdict for defendants, and, also, ten special findings.

The court, KNOWLES, J., refused the motion for a new trial, and plaintiffs appealed.

The facts are stated in the opinion.

CLAGETT & DIXON, for appellants.

The evidence was insufficient to justify the verdict and special findings. The deposit of tailings, by respondents, the injury to appellants' ground, and the amount of damages sustained by appellants, were proved and not disputed. The testimony did not show any custom to allow tailings to run free down the gulch. Civil Prac. Act, § 193; *Minturn* v. *Burr*, 20 Cal. 48; *Lyle* v. *Rollins*, 25 id. 440; *Carpentier* v. *Gardiner*, 29 id. 160; 1 Gra. & W. on New Trials, 367; 3 id. 1204, 1207; *Esmond* v. *Chew*, 15 id. 137.

The court erred in refusing to give instructions asked for by appellants.

The respondents having assisted in and consented to the organization of Lincoln district, and the enactment of its laws, and having availed themselves of such laws and located their ground anew under these laws, which gave them more ground than they could hold before, thereby accepted and were bound by these laws. The respondents were confined, by their new location, to three hundred feet of ground for dump, if they chose to locate it. Respondents could not, while locating under and claiming the benefit of these new laws, claim other and different rights under a former location and previous laws.

Appellants hold that no mining law or custom can authorize a trespass on the property of another, especially where such trespass might lead to the entire destruction of the property. Such a custom would be in conflict with the laws of the Territory, and void. *Esmond* v. *Chew*, 15 Cal. 137.

WOOLFOLK & TOOLE, and MAYHEW & MCMURTRY, for respondents.

The evidence was conflicting, and the jury determined its weight. *Kile* v. *Tubbs*, 32 Cal. 333.

The respondents were using the ground as a dump when appellants located it. They so located, with full notice of respondents' rights. It was the custom of the miners to let such tailings, as the water of the gulch would carry, run free down the gulch. This custom was in force when appellants located their ground. The position that respondents were only entitled to three hundred feet for dump, is immaterial, as the custom was as above stated. Respondents were running their tailings upon and through appellants' ground when appellants pre-empted it. Such use was necessary and beneficial to respondents, who should be protected in the advantage of their prior location. *Logan* v. *Driscoll*, 19 Cal. 623.

The instructions of the court were correct. The jury did

not find a single issue for appellants, and it devolved on them to make out their case.

Under our statute, the miners of a district make such laws as they deem expedient, and such laws have full force, if not in conflict with the law of the Territory. Acts 1865, 169, § 634.

The appellants were not entitled to any damages, and showed no right to recover them. The respondents' mining ground would be rendered useless, without permitting their tailings to run in accordance with the custom of the district.

SYMES, J. This was an action brought by plaintiffs, alleging that they were and had been for two years the owners of certain mining ground in Lincoln district, Carpenter's gulch, Deer Lodge county, Montana, *to wit:* Six claims next below discovery; that said mining ground had been located for the purpose of mining the same by bed rock flumes; that they had been continually working and mining the same when practicable since location, and had constructed a bed rock flume and a reservoir for harboring the water. Further, that defendants have been for more than a year mining on ground in said gulch, six hundred or eight hundred feet above the plaintiffs, and have been using the water of said gulch through a flume; that in 1868 and 1869, while plaintiffs were in possession of their ground and flume, and waters of gulch, defendants wrongfully and unlawfully washed and run large quantities of rock, tailings, gravel and sediment on to the plaintiffs' ground and in and upon their reservoir, and covered up and obstructed their reservoir; that plaintiffs had been prevented from mining their ground and had sustained damage to the amount of $3000, and demanded judgment and an injunction.

Defendants answered, denying the allegations of the plaintiffs' complaint, and alleged that they had located their mining ground above prior to plaintiffs' location, and that plaintiffs took their mining ground subject to defendants' prior right to let their tailings, etc., run down the natural channel of the gulch. And alleged that there was a cus-

tom in the district where said mining ground was situate, that gave those above in the gulch the right to let their tailings run down the natural channel of the gulch without cribbing the same; and that plaintiffs located their mining ground subject to this mining custom.

The cause was tried at the September term of the Deer Lodge county district court, judgment rendered for defendants, motion for new trial overruled, and case appealed from order overruling motion for new trial. The facts of the case quite fully appear in statement on motion for new trial and special findings submitted to the jury.

We are asked to reverse the judgment and grant a new trial, first, because the verdict is contrary to law and the evidence; and second, because the court erred in giving and refusing certain instructions.

The jury, in addition to their general verdict for defendants, found, in their special verdict, that defendants located and owned their mining ground above in the gulch prior to plaintiffs' location below and adjoining; that defendants owned three hundred feet of the ground next below the upper line of number one, claimed by plaintiffs, for the purpose of depositing their tailings thereon, and were actually using the same for such purpose when plaintiffs located it with their other ground below; that it was the custom and usage of miners in the mining district where plaintiffs' mining ground was situate, to let so much of the tailings and sediment, as the natural waters of the gulch would carry, flow free, at the time plaintiffs located their mining ground; and that the alleged damage accrued by reason of defendants letting their tailings and sediment so to run free.

There were other special findings immaterial to the main issues.

The court below states, in reasons for overruling motion for new trial, that it thinks the weight of evidence was contrary to some of the special findings; but that there was some evidence on both sides, as appears in the statement, and therefore the verdict cannot be set aside. We think this the correct doctrine: that although the preponderance

of evidence may have been in favor of the plaintiffs on the two main issues, *viz.:* Whether defendants owned three hundred feet below the upper line of claim number one, for, in miner's parlance, dump; and whether there was a custom to let tailings run free; still, as there was some considerable evidence on both sides, the judgment cannot be reversed for that reason.

This brings us to the consideration and necessary decision of a question, which, after twenty years of mining litigation in California, has never been fairly met and decided, viz.: how far a mining custom to let tailings run free down a gulch without any let or hindrance (such as was found by the jury to exist in this case), can interfere with and destroy the mining operations and ground of persons locating for mining purposes in the same gulch below and after such custom or regulation has been established.

It plainly appears that, if defendants' tailings are allowed to run free, in accordance with said custom, it will entirely destroy plaintiff's mining ground, and render his mining operations valueless. Will the law allow such a custom to take away and destroy the property rights of plaintiffs, acquired as aforesaid, and will defendants' prior location be a good defense under the maxim *qui prior est in tempore potior est in jure?*

The case of *Esmond et al.* v. *Chew et al.*, 15 Cal. 137, is a case in point on question of first in time, first in right, and establishes the doctrine that a person locating ground on the bed of a stream, or in a gulch, prior to one locating ground below, does not acquire the right, by such prior location, to go on to and construct a tail race on subsequently located ground below, and cannot, as matter of strict legal right, therefore, allow tailings and sediment to run free, to the destruction of the mining property of junior locators below. Where the useful working of the claim above, with reasonable care and diligence, will necessarily work some injury to the claim below, it would be *damnum absque injuria;* but this would be a question for the jury under the instructions of the court, and cannot avail defendants

in this case, as it appears that what they justify would entirely destroy the mining property of plaintiffs, and make it impossible for them to work their claims. But this case does not reach the question, how far a local mining custom could authorize a destruction of mining operations below. But the court say that, if the damage was justified by a local custom or regulation, its existence should have been alleged and proved; perhaps intimating that such a custom would justify such damage. The other case cited (*Logan* v. *Driscoll*), where the plaintiff owned mining ground below, and defendants located above, after plaintiff, it was held that the maxim first in time, first in right, applied to this case, and defendant was enjoined from allowing tailings to run down to the damage of plaintiff, defendant being junior locator.

The court below instructed the jury in accordance with the above cited decisions, so far as applicable; but also gave instruction to the effect that, if the defendants proved a custom allowing tailings to run free, that would be a good defense or justification for any damage resulting to plaintiffs' mining operations below; and the case was tried, and judgment rendered on this theory. We think this theory cannot be maintained in accordance with strict legal principle. To support this doctrine of free tailings by custom, would be to allow a few miners or flume companies to go into the head of a mining gulch and prevent, perhaps, miles of valuable mining ground below them from being taken up and developed; because no one could tell, if they located below, how soon their ground would be entirely covered up and destroyed, under this custom of free tailings. Such a mining custom would be in contravention of the leading principle that customs must not be inconsistent with the full and rapid development of all the mining resources of the country: for the miners of a district might as well take possession of a large gulch, and establish a regulation that each claim should be five thousand feet up and down the gulch in size, as to put a few flumes in at the head of a gulch, and, under the contended for custom of free tailings,

not allow them to be cribbed, and thereby prevent rich mining ground, for miles below, from ever being worked or developed.

We are not, by this decision, restricting any of those mining rights which may be acquired by prior location, or as appurtenant to mining ground, nor contravening the doctrine, that the miners may establish such customs and regulations, not inconsistent with the laws of congress and the Territory, as to them may seem just and necessary; but only that the doctrine of free tailings cannot be, abstractly, and without restriction, maintained. Where persons locate ground for the purpose of constructing a flume, they can locate any number of feet, not in violation of the mining regulations of the district, and if there are no regulations not exceeding a reasonable amount for the deposit of tailings, or dump, but the boundaries of the same must be marked in accordance with the regulations of the district; or, if there are more, by fixing the boundaries by such physical marks as will advertise the precise ground claimed for mining and dump; so that those wishing to locate thereafter may know what is vacant. *English* v. *Johnson*, 17 Cal. 117. And there are other appurtenant rights acquired and necessarily attaching to the claim, defined by the mining law, and the peculiar circumstances surrounding such case. To allow the custom of free tailings to govern without restriction, would be in opposition to this principle, that parties locating are bound to mark the boundaries of their claims, which shall be notice of the extent of the mining ground and rights acquired to subsequent locators, for all the first locators would have to do, would be to pass the mining custom of "free tailings;" then defining boundaries by physical marks would be useless, because if any one located below, they could run their tailings on to, and render their ground valueless, and this custom unrestricted would prevent junior locators from cribbing or stopping the tailings from above in any way.

There was evidence in the case to show that if the tailings were not allowed to run free, the defendant's mining opera-

tions would be rendered useless, and would be destroyed; but the jury found the defendants owned three hundred feet of the ground claimed by plaintiffs, below their own mining ground, for deposit of tailings. The evidence and peculiar circumstances of the case might justify defendants in the reasonable prosecution of their mining operations, under prior location, in working some necessary injury to plaintiffs, which would be *damnum absque injuria*. But a mining custom which would allow the total destruction of a junior locator's mining operations, in a gulch below prior locators, on ground which was vacant, cannot be maintained under any statute or common mining law with which we are acquainted. Therefore, the court erred in instructing the jury that the defendants could justify the destruction of plaintiffs' mining operations, by proving a custom or regulation to let tailings run free.

Judgment is reversed and cause remanded for a new trial.

Exceptions sustained.

NOLAN, respondent, *v.* LOVELOCK et al., appellants.

MINING PARTNERSHIP — *authority of partners in mining to hire laborers.* The law presumes that every member of a mining firm has authority to hire laborers and make the firm liable for their wages, if they are necessarily employed in working upon the joint property, and no evidence of such authority is required.

MINING PARTNERSHIP — *liability for wages of laborers, with notice.* Laborers that are hired by one member of a mining firm cannot recover their wages from the firm, if they had notice of an express agreement that such a contract must be ratified by all the members.

PLEADING — *complaint on mechanics' lien must state a contract.* The complaint of a party, who claims to have a lien upon mining ground, for labor performed, must state facts that constitute a contract, but it is not necessary to name the contract.

MECHANICS' LIEN — *not lost by excessive claim.* A laborer does not lose his lien for the amount actually due, by claiming a lien for a sum in excess of that to which he is entitled, unless there is fraud connected with the transaction.

Appeal from the Third District, Meagher County.

IN April, 1870, Nolan commenced this action against Lovelock, J. R. Weston and J. A. Harding, in the district court in Meagher county. The defendants demurred to the complaint, because there was a defect and misjoinder of parties defendant; the complaint did not state facts sufficient to constitute a cause of action, and the complaint was ambiguous. The demurrer was overruled by the court, SYMES, J., and defendants excepted.

The cause was tried in May, 1870, by the court, SYMES, J.

It appeared from the evidence that the defendants owned mining ground in Confederate gulch, Meagher county, in the following undivided proportions: Lovelock, $\frac{64}{100}$; Weston, $\frac{26}{100}$; and Harding, $\frac{10}{100}$. Lovelock hired Nolan to run a whim upon the mining ground, and agreed to pay him for his services and the use of his mule, $7.50 per day. Weston sometimes paid him for his services, and gave him on January 6, 1870, the following instrument: "Due from Lovelock, Weston & Co. to date, to John Nolan, $444.50." The defendant also owed other sums to Nolan on different accounts. Neither Harding nor Watson ever spoke to Nolan about his contract. None of the defendants had any authority from the others to hire laborers, or bind them by his contracts, and each defendant was to pay his proportion of the expenses.

The plaintiff filed his account in the county recorder's office, in Meagher county, to secure a lien on the mining ground for his services, and claimed that the defendants owed him $544.90.

The court rendered judgment for plaintiff for $544.90, and that he was entitled to a lien on the mining ground to secure the payment of $445.90 thereof.

The court, SYMES, J., overruled the defendants' motion for a new trial, and defendants appealed.

CHUMASERO & CHADWICK, for appellants.

The demurrer was well taken. The complaint would not support an action for the enforcement of the lien, unless it

contained an averment that the labor was done under a contract, and the lien was filed for personal property, and, therefore, could not be enforced. Houck on Liens, §§ 55–132.

It was error to admit evidence of a contract, when there was none in the complaint.

The appellants, according to the evidence, were not governed in the management of the premises in question (being mining ground) by the law governing commercial copartnerships, but were tenants in common, uniting in a general system of management. There was no joint indebtedness, as found by the court. Rockwell on Span. and Mexican Law, 5, 574, *et seq.*; *Skillman* v. *Lachman*, 23 Cal. 199.

The evidence showed that respondent was seeking to enforce a lien for a much larger amount than he was entitled to. He, therefore, lost his right to a lien for any portion of the amount claimed. Houck on Liens, § 210.

S. ORR and SHOBER & LOWRY, for respondent.

The complaint is sufficient, under the laws of Montana, to support a laborer's lien. Acts 1865, 334; Acts 1867, 80.

The evidence of the contract was properly admitted. *Farron* v. *Sherwood*, 17 N. Y. 227.

The evidence shows that appellants were mining partners, and liable as such to respondent for the labor he performed on the mining ground owned by appellants jointly, and the drain to said ground. *Skillman* v. *Lachman*, 23 Cal. 199; *Duryea* v. *Burt*, 28 id. 569; *Dougherty* v. *Creary*, 30 id. 290.

The parties owning a mining claim as tenants in common, and engaged in working it, are partners. It is not necessary that there should be an express stipulation between the partners to show the profits and losses, as that is an incident to the prosecution of their joint business. Sto. on Part., §§ 18–25–82; Coll. on Part., § 18; 3 Kent's Com. 24, 25.

KNOWLES, J. This is an action to foreclose a lien upon certain mining ground owned by appellants, for work and

labor done thereon. The respondent, in the court below, obtained judgment against the appellants for $554.90, and a decree for the sale of this mining ground — upon which a portion of the work had been performed — to satisfy $445.90 of this amount. The appellants, in the court below, moved for a new trial, which was denied. From this judgment they appealed to this court, assigning as error the points which will now be considered.

The evidence shows that the appellants owned certain mining ground in Confederate gulch as tenants in common; that they worked it together, and that the gold taken therefrom went first to pay the expenses of working it, and the residue, if any, was to be divided among them in proportion to the interest of each in the mining ground. This made them mining copartners. *Duryea* v. *Burt et al.*, 28 Cal. 569.

One of the partners, Lovelock, employed respondent to work on the mining ground in mining. He performed work that amounted to $445.90, for which he was not paid. The question arises whether Lovelock had authority to bind his copartners in contracting a debt for working in their mine. One partner in a mining copartnership has authority, by implication of law, to bind his copartners in creating a debt for the purposes of working their mine, if it appears that such work was useful or necessary for that object. Yale on Mining Claims & Water Rights, 224, and cases there cited. There is no doubt but that the labor performed by respondent was useful in working their mine, and that appellants received the benefit of it. Perhaps, in some cases, one partner might limit his liability even for necessaries, by giving notice to the person performing such work, in due time, that he would not be liable therefor. Where, however, a firm is composed of more than two persons, if a majority agree upon any undertaking in working mining ground, it would be doubtful whether any one of the partners could limit his liability for necessaries, as a majority of the firm, in such cases, ought to control. *Daugherty* v. *Creary*, 30 Cal. 290.

In this case there were three copartners, one of whom hired respondent, and another of whom settled with him and gave him a memoranda, stating how much the firm was indebted to him. This would go to show that, at least, one had contracted with respondent, and the other had ratified it. The appellants all testified that neither one of the firm had authority to bind the others, and also considerable concerning the interest of each in the mining ground. It might be that some of this evidence was introduced to show that the copartners had limited their liability, but I do not think it was sufficient to warrant the court in finding any such notice. I am, however, inclined to think that appellants introduced this evidence to show that appellants were tenants in common of the mine, and, hence, were mining copartners, under the impression that it devolved upon the respondent to show some express authority, from each copartner, to authorize any member of the firm to bind the rest. The rule, however, is different. It devolves upon the firm to show that they had an express agreement with each other, that one should not contract for what was useful or necessary without the express consent of the others, and that the party contracting with any member of the firm had notice of this agreement. Without this the law gives authority to each member of a mining copartnership to bind the rest for what is useful and necessary in their undertaking. No such agreement as this was proved in this case.

There is nothing in the point insisted upon by appellants' counsel, that the complaint does not state facts sufficient to warrant the court in decreeing respondent a lien on the mining ground, because the complaint does not say that the respondent labored upon this mining ground under an express or an implied contract. The facts set forth in the complaint show that the respondent performed the work under an implied contract. This is sufficient. It is not necessary for a party to state the name of the contract he sues under When he states the facts amounting to a contract the law names it.

It is claimed by appellants that, because respondent claimed a lien for a larger amount than he was entitled to, he lost his lien. A person seeking to foreclose such a lien appeals to the equity powers vested in a court. No court of equity ought, in the absence of an express and positive statute, to hold that a person claiming a lien for more than he was entitled lost his lien, unless it clearly appeared that there was some fraud connected therewith.

The respondent is, therefore, entitled to a judgment against the appellants for $445.90, and a lien for that sum on the mining ground upon which he performed the work.

The court below gave the respondent a further judgment for $93, for work done on a bed-rock flume. In the statement on the motion for a new trial, the contract under which this work was done is set out in full. It is not a joint contract. These appellants and other parties became bound, individually, each in a certain sum, and neither one, in any way, became bound for the other. There is no evidence that this copartnership ever became, in any way, bound for this debt. If any of the individual members of the firm owe this amount, or portions of it, the respondent must recover it of them individually. He cannot recover it in this action.

The judgment of the court is, therefore, modified. Respondent should have judgment for $445.90, and a decree for the sale of the mining ground specified in the notice of lien.

Judgment modified.

HIGGINS et al., appellants, *v.* GERMAINE, respondent.

PLEADING — *complaint — averment of express promise.* Under the civil practice act, a complaint should not set forth a promise which is implied from the facts alleged, but an express promise must be averred and proved.

PLEADING — *answer — denial of implied and express allegations.* The denials of the answer must controvert the express allegations of the complaint, and those that are necessarily implied from them.

PLEADING — *denial of indebtedness — issue.* In an action on an account for goods sold and delivered, a denial of the indebtedness raises no material issue.

Appeal from the Third District, Lewis and Clarke County.

HIGGINS and Hagadorn commenced this action in February, 1870, to recover from Germaine $1,847.15, on an account for goods sold and delivered. The defendant demurred to the complaint, on the grounds that the complaint did not aver a promise to pay the amount demanded, or that this amount was the reasonable value of the property alleged to have been sold, or that this amount was the contract price therefor. The demurrer was overruled, and the defendant filed the following answer, which is referred to in the opinion of the court:

"Now comes the defendant, G. Jules Germaine, and for answer to the complaint of the plaintiffs, denies that, on the 2d day of February, 1870, or at any other time, he was or that he now is indebted to said plaintiffs in the sum of $1,847.15, or any other sum, on account for goods, wares and merchandise, consisting of groceries, provisions and other articles, sold and delivered to this defendant.

Denies plaintiffs' rights to recover in this action, and avers that the only indebtedness existing or owing from the defendant to said plaintiffs, accrued on an account for gold dust, the amount of which is much less in value than the claim made by said plaintiffs in their complaint. That the goods, wares and merchandise claimed by said plaintiffs to have been sold and delivered to this defendant, by the terms of such sale and purchase, were to have been paid for in

gold dust. That he made no other contract, and had no other transactions with said plaintiffs, by which he became indebted to them in any manner whatever.

Wherefore, he asks judgment for his costs and disbursements in this action."

The cause was tried in April, 1870, by the court, SYMES, J. After the testimony had been concluded, the defendant filed his motion for a nonsuit upon the following grounds:

"1. The evidence does not show that the goods sold were at any particular price agreed on, or any promise to pay any particular sum or price therefor, or that any sum of gold dust was found due.

"2. The evidence does not show that defendant promised to pay the sum claimed, or any other particular sum.

"3. The evidence shows that there was a special agreement or contract for the goods claimed to be sold, which was payable in gold dust, and that said gold dust was, by the terms of said contract, to be valued at $22½ per ounce, which contract is not averred in the complaint."

The court sustained the motion, and plaintiffs appealed.

CHUMASERO & CHADWICK, for appellants.

Respondent's denial of the indebtedness claimed to be due in the complaint is not a sufficient denial under our statute. Civil Prac. Act, § 41; *Curtis* v. *Richards*, 9 Cal. 33; *Wells* v. *McPike*, 21 id. 215.

The evidence sustains the averments of the complaint of the indebtedness due from respondent to appellants, and conclusively disproves the averment in the answer, that the goods were sold and delivered, to be paid for in gold dust. All that is required in a complaint is a statement of the facts constituting the cause of action, in ordinary and concise language; and, if money be demanded, the amount should be stated. Civil Prac. Act, § 39. Nothing should be alleged affirmatively which a party is not required to prove. *Green* v. *Palmer*, 15 Cal. 413.

A complaint which alleges that the defendant is indebted in a specific sum, for goods sold and delivered by appel

lants to respondent, at his request, and that such sum is due from him to them, is good. *Allen* v. *Patterson*, 7 N. Y. 476.

Even if there had been a contract to sell at a stipulated price, after the contract had been completed on the part of the appellants, an action could have been maintained for goods sold and delivered. *Farron* v. *Sherwood*, 17 N. Y. 227.

The only defense interposed in this case in the court below was, that the goods were sold under a special contract, and unless that defense was sustained by the evidence, the nonsuit was erroneously granted.

It was not necessary to make a motion for a new trial in the court below. *Darst* v. *Rush*, 14 Cal. 81; *Sullivan* v. *Cary*, 17 id. 80.

WOOLFOLK & TOOLE, for respondent.

The evidence must support the allegations of the complaint. This action should have been for so much gold dust, at an agreed price. The goods were sold for gold dust upon an implied contract to pay their reasonable value, and, after the reasonable value of the goods was ascertained, to pay a certain amount in lawful money for the gold dust. *Robertson* v. *Lynch*, 18 Johns. 456.

A party who can recover upon an implied promise to pay must show that it was for a stipulated price or sum certain. *Keteltas* v. *Myers*, 19 N. Y. 231; *Moffett* v. *Sackett*, 18 id. 522; 1 Estee's Pl. 224, *et seq.*

The form of the action of assumpsit has been abolished, but the distinction between express and implied assumpsit remains. The court below determines upon which of these he supported the complaint, and permitted the parties to go to trial. Appellants must show that they followed the interpretation given by the court. If they did not do this, they subjected themselves to the liabilities of a nonsuit. Appellants should have amended their pleadings, or excepted to the construction of the pleadings given by the court. Did the court below abuse its discretion? Appel

lants fail to show any injury from the ruling of the court. *Todd* v. *Winants*, 36 Cal. 129.

The evidence does not support the complaint. A party cannot avail himself of facts proven upon the trial, if not issues made by the complaint. *Field* v. *Mayor, etc.*, 2 Seld. 179; *Brazill* v. *Isham*, 2 Kern. 9; *N. Y. Central Ins. Co.* v. *National P. Ins. Co.*, 4 id. 85. A promise to pay a sum certain, in assumpsit, must be averred and proved.

The evidence in the record cannot be entertained by this court, because no motion was made to set aside the nonsuit or grant a new trial. This is an appeal, and the court cannot review the evidence. 3 Estee's Pl. 15, 499. If the judgment of nonsuit is against law, a new trial might have been granted if applied for. *Kower* v. *Gluck*, 33 Cal. 401. No such motion was made by appellants. If the ruling of the court, after both parties had rested their case, was a matter of law, the proper mode was by saving exceptions by a bill attached to the judgment roll. *More* v. *Valle*, 28 Cal. 170; *Lucas* v. *San Francisco*, id. 591; *Lyons* v. *Leimback*, 29 id. 139; *Clark* v. *Willett*, 35 id. 534.

The court cannot order judgment in favor of appellants, and thereby exercise the province of the court below, and weigh testimony. The judgment can only be reversed upon questions of law. *People* v. *Empire G. & S. M. Co.*, 33 Cal. 173; *Wetherbee* v. *Carroll*, id. 553.

The evidence set out is uncertain, and will not be reviewed by the court. (1 oz. or $) 3 Estee's Pl. 181, 702.

KNOWLES, J. In this action the court below sustained a motion made by the defendant for a nonsuit, for the reason that the plaintiff's proof had not established the material allegations of the complaint.

This ruling is assigned as error by the appellants. In determining whether the ruling of the court below was correct, it is necessary to observe what were the issues presented in the pleadings, for these determine what the plaintiffs were required to prove. The complaint is in the form of a common indebitatus count, for goods sold and delivered in a

declaration in assumpsit at common law, save that no allegation of the promise to pay the amount claimed due is set forth. Under our code system of pleadings, a promise, when it is implied, need not be alleged, for it is not proper under this system to set forth implications of law. A complaint, similar to the one in this action, was held, in *Allen and Carpenter* v. *Patterson*, 7 N. Y. 476, to state facts sufficient to constitute a cause of action; and, according to this authority, it may be safely said that this complaint implies clearly that a contract had been made between plaintiffs and defendant, by which the former had sold and delivered to the latter, goods, at his special instance and request, for the price named in the complaint, which the defendant had promised to pay; that the time when the same was to be paid had expired, and that it was now due and unpaid. All that was required of the plaintiffs was to establish these facts. If they are not controverted by the answer they are admitted, and that is sufficient. A promise that is implied from the facts of a case need not be proved, while an express promise has to be both alleged and proved. The promise in this case, as in that of *Allen and Carpenter* v. *Patterson*, above referred to, is an implied one. Under our Code, as well as under the common-law system of pleadings, the denials of the answer should not only controvert the express allegations of the complaint, but also those necessarily implied therefrom. Van Santv. Plead. 422, 423.

It was necessary, then, that the defendant should controvert all or some of the allegations above specified. The first denial is simply a denial of indebtedness. This, it has been frequently held, raises no material issue whatever. The other allegations of the answer do not directly controvert any of the allegations of the complaint, but set forth that the goods were purchased for gold dust. This, of course, inferentially denies that the goods were sold for so much money. It is very difficult to class such an answer as this. It is not a specific denial of the allegations of the complaint, nor does it confess and avoid them, for if it is true, all the allegations of the complaint are not. The allegation in

relation to the contract being for gold dust, is set forth in the answer, as though it was new matter constituting a defense. The new matter constituting a defense provided for in the Code is, I think, the setting up of such defenses as coverture, infancy, payment, failure of consideration, recoupment and such classes of defenses, amounting to a full or partial defense to the action. This defense sought to be set up in this action is not embraced within any of these classes. It is one that undoubtedly could have been introduced under a specific denial, denying that the defendant ever contracted to pay the plaintiffs the sum named in their complaint, or any other sum of money, for said goods, wares and merchandise. At the trial, the answer was treated as though it was such a denial as this. Whether a court should consider such an answer a nullity, without any objection on the part of the plaintiff, I am not prepared to say. Giving it all the force claimed for it, the only issue raised by it is, as to whether the goods were sold for money or gold dust. All the evidence in the case is positive upon the point that it was for money. The court should, then, have found this fact, which would have decided the cause for the plaintiffs.

The judgment of the court below is therefore reversed, and the cause remanded.

Exceptions sustained.

KING et al., appellants, *v.* EDWARDS et al., respondents.

MINING CUSTOMS—*effect on common law.* The rules and customs of miners in a particular district are laws, and constitute the American common law on mining for precious metals.

MINING CUSTOMS—*location of mining ground.* The rules and customs, which point out the manner of locating mining ground, are conditions precedent, which must be substantially complied with.

MINING CUSTOMS—*forfeiture presumed when miners fail to work their claims.* The rules and customs of miners, that require locators to do a certain amount of work upon their claims, are conditions subsequent; and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs.

MINING CUSTOMS — *re-location of forfeited mining claims.* Mining claims, which are forfeited, can be re-located by any person who complies with the rules and customs of the district in which they are situated.

MINING CUSTOMS — *construction of mining rules by courts.* Courts must construe mining rules and customs and require the owners of mining ground to develop and work it, if consistent with law.

MINING CUSTOMS — *rules of a district not varied by those of another.* The rules and customs of the miners of one district cannot be introduced to vary those of another district.

MINING CUSTOMS — *mining laws presumed to be in force.* It is presumed that the written laws of a mining district are in force, and any custom that conflicts with them must be clearly proved.

MINING DISTRICTS CHANGED — *vested rights.* The extent of a mining district may be changed by those who created it, if vested rights are not thereby interfered with.

MINING RULES — *representation of mining ground by labor and a bed-rock-flume.* All mining rules and customs must be reasonable. Those which compel persons to perform labor in the district to represent their mining ground, which cannot be profitably worked without running a bed-rock flume to it from another district, are unreasonable.

Appeal from the Third District, Meagher County.

IN May, 1869, King and Gillett filed their complaint against Edwards and ten others, including John Doe and Richard Roe, in the district court in Meagher county. The cause was tried by a jury in November, 1869, before SYMES, J., and a verdict was returned for defendants. The facts are stated in the opinion.

WOOLFOLK & TOOLE, for appellants.

There was no evidence that appellants had abandoned the ground in controversy. The laws of German district, even if in force, make no provision for a forfeiture, but were designed to make representation easy instead of difficult. *McGarity* v. *Byington*, 12 Cal. 426; *Colman* v. *Clements*, 23 id. 248; *Bell* v. *Bed Rock T. & M. Co.*, 36 id. 217.

No witness swore that the laws were in force. The record shows that there had been a dispute for three years past, as to what laws were in force. Acts Montana, 1865, 169, § 634.

The questions of abandonment and forfeiture, under the laws of German district, were the only issues raised by the pleadings. The record shows that appellants introduced evidence, that a custom had grown up in German district,

permitting representation of ground by work outside of the district, as in cases of flumes or drain ditches. The respondents sought to prove that there had been no such custom, as there had been no such case before in the district. Not one of respondents' witnesses asserted that there was any custom in the district, making a forfeiture, when ground was represented in the manner that appellants represented their ground. Not one of respondents' witnesses testified to any fact creating a custom, but simply gave their own opinion as to what was or was not the custom. Such evidence could not establish a custom or disprove one. 2 Greenl. Ev., §§ 250, 252; 1 Black. Com. 76, 77.

The court erred in admitting the resolutions offered as the laws of German district. *English* v. *Johnson*, 17 Cal. 107.

The court erred in refusing to allow certain questions to be put to the witnesses, Kane and Woods. It was competent to ask them, on cross-examination, if there was any custom in German district which would prevent representation by bed-rock flume in the district below. 1 Greenl. Ev., § 446, *et seq.*; 3 Estee's Pl. 450, § 49; *Jackson* v. *Feather River Water Co.*, 14 Cal. 23. If there was no custom which prevented such mode of representation and subjected the ground to forfeiture, it could not be forfeited. The questions were asked to show that there was no such custom.

The court erred in refusing to permit appellants to show in rebuttal the boundaries of German district at the time of the adoption of the laws. Appellants' witnesses never defined these boundaries. It was clearly competent to show that, at the time of the adoption of these laws, German district embraced appellants' bed-rock flume, and that respondents were seeking to apply old laws or customs to a new district with smaller dimensions than the one first created.

CHUMASERO & CHADWICK, for respondents.

This action is to recover the possession of a mining claim, and is governed by the law applicable to actions of ejectment. The appellants must recover upon the strength of

their own title. The respondents set up as special defenses, abandonment and forfeiture.

The question of abandonment was one entirely for the jury, and, as there was evidence tending to prove the same, the court cannot disturb the verdict. *Depuy* v. *Williams*, 26 Cal. 309; *Roberts* v. *Unger*, 30 id. 676.

The defense of forfeiture of appellants' right to the premises in dispute was clearly established. The evidence showed that they were in the German district; that the miners of that district had adopted certain rules long before appellants claimed this ground; that these rules required a certain amount of work to be done in the district to hold mining ground, and that appellants had failed to perform it. Whether the laws were in force, or whether the appellants had complied with these laws, or whether the ground had been forfeited under the laws as shown by the evidence and the law as given by the court, were questions entirely for the jury to pass upon, and their verdict cannot be disturbed by this court. *Packer* v. *Heaton*, 9 Cal. 568; *St. John* v. *Kidd*, 26 id. 263; *Depuy* v. *Williams*, 26 id. 309; *Morton* v. *Solambo C. M. Co.*, id. 532.

No exceptions to the instructions of the court were taken by either party. The appellants only claimed a possessory right to the ground in dispute, having no title from the government. That right could only be preserved by a compliance with the local mining laws, and, in case of non-compliance therewith, a forfeiture would arise. *Warring* v. *Crow*, 11 Cal. 366; *Gluckauf* v. *Reed*, 22 id. 468; *St. John* v. *Kidd*, 26 id. 263.

If there were no local rules in the district, the ground could only be held by an actual and continuous possession.

Appellants fail to make out any case for a new trial upon the ground of newly-discovered evidence. They show no diligence, and the newly-discovered evidence is cumulative. Gra. & W. New Trials, 473–485.

All questions as to customs or usages in force in the district were properly left to the jury. They were questions

of fact for them to determine, and their verdict cannot be set aside, if it was supported by the evidence.

KNOWLES, J. This is an action of ejectment brought by the appellants to recover possession from the respondents of certain mining ground, situated in German district, Confederate gulch, Meagher county.

The appellants claim title from those who first located the same. The respondents claim that appellants forfeited the ground and set up title in themselves.

The law which requires work to be done on mining ground in German district does not provide that a failure to comply therewith shall work a forfeiture of the ground.

The first question presented for us to answer is, whether it is necessary for this law to so provide in order to have this effect.

The mining customs of any particular mining district have the force and effect of laws, or, in other words, are laws. The local courts in each one of the States and Territories, where placer mining is prosecuted to any extent, have so recognized them, and finally, congress, by an act in July, 1866, recognized these rules and customs as law.

The title to mineral lands is vested in the United States. Any citizen of the United States, or any person who has declared his intention to become such, may, by complying with the local rules and customs of any district, become vested with the right to possess and mine any specific portion of mining ground. The customs which point out the manner of locating mining ground are conditions precedent. A substantial compliance with them is necessary. The right to possess and mine any mining claim is derived from the United States by virtue of this compliance. The United States is divested of this right as effectually as if these rules and customs were acts of congress, for they now are the American common law on mining for precious metals.

The regulations of miners which require that so much work must be performed upon each claim are conditions subsequent. The locator of a mining claim takes subject

to this condition. So long as he complies with it, the right to possess and mine the same remains with him. Whenever a condition subsequent is attached to any right or title vested in a party by virtue of law, it is not necessary that the law should provide that a failure to comply therewith works a forfeiture of the right. Even when a condition subsequent is expressed in a deed, it is not necessary that it be specified that a failure to comply with it entitles the grantor to enter and take possession of the tenements. It is implied that he has this right. 4 Kent's Com. 140.

It is true that, where a mine is forfeited, it becomes forfeited to the United States, of whom the locator derived title. Formerly only the grantor, or his heirs, could proceed for forfeiture; but under the law, as it now stands, an assignee of the rights of the grantor can proceed to declare a forfeiture. 4 Kent's Com. 138, 139.

When mining ground is forfeited by any one, it again becomes unappropriated mineral land of the United States. Any one who relocates it, in accordance with the mining rules and customs of the district in which the same is situated, has the rights of the government, and may proceed to declare a forfeiture, or may set up the defense of forfeiture in an action against him.

From the statement in this case, it would seem that it is conceded that both parties claim by virtue of the local rules and customs of the district where the ground is situated. At all events, as far as the statement goes, they both stand upon the same footing. It is doubtful whether any person could acquire and possess a mining claim, without complying with the local rules and customs upon that subject since the act of congress of July, 1866, upon the subject of mining.

I think I may safely say that this rule in relation to the forfeiture of mining claims is substantially the same as entertained by miners generally themselves. It is not often that a mining law declares that a failure to comply with the one, in relation to working and developing mining ground,

works a forfeiture. Yet it is generally considered among miners, that such a failure will have this effect.

The Spanish edicts upon mining in Mexico, which is the source from which we derived our mining rules and customs, established that all right to mining ground had attached thereto the condition of development. A failure to perform so much work on any mine worked a forfeiture. There a proceeding, in its nature judicial, was always instituted, however, to declare a forfeiture and an adjudication made before the ground was subject to relocation. This, however, in our country, is not necessary. The policy of the government of the United States has been to throw open its mines to its citizens, and to encourage the extraction of as much precious metals therefrom as possible. And observing that miners, by their customs, have attached as a condition to the right to possess and mine any mining ground, that of working the same, they have recognized them. The condition of development should be attached to every mine; and courts should, as far as consistent with legal principles, maintain the construction of mining customs which accomplish this end.

The decisions in California, which generally deserve great weight upon the subject of mining, are far from being satisfactory upon this one subject — forfeiture of mining ground. Undoubtedly, mining customs should be construed strictly against forfeiture, as laid down in *Coleman* v. *Clements*, 23 Cal. 248. But, where a custom is plain, there is no room for construction, and a court must take it as it reads, and give it its legal effect. The case of *McGarrity* v. *Byington et al.*, 12 Cal. 426, and that of *Bell* v. *Bed Rock T. & M. Co.* certainly lay down a different rule from that expressed here, while *St. John* v. *Kidd*, 26 Cal. 263, lays down the same rule. It is to be observed that the case of *St. John* v. *Kidd* does not purport to overrule that of *McGarrity* v. *Byington et al.* Nor does the case of *Bell* v. *The Bed Rock T. & M. Co.* purport to overrule that of *St. John* v. *Kidd*. The conclusion that we must come to from this is, that this point has never been fully considered by the

California courts. No reasoning is given in support of the rule, in either case, and no authorities; and, hence, it is impossible to tell how they arrived at their conclusions. The rule we have expressed we believe is in accordance with the established principles of law, and comports with the understanding miners have of their own customs, and is consonant with the policy of the general government.

The point made by appellants' counsel, that, because there was a dispute as to what the customs in German district were, therefore the jury were not warranted in finding a forfeiture, is not well taken. The record shows that there was considerable evidence as to what were the customs of German district. This issue and the one as to what customs were in force in the district, was properly left to the jury, and this court must presume that they found the one requiring work to be done in the district, in order to represent a mining claim in force.

The objection to the questions asked Kane, as "to whether he knew of any custom within German district which will prevent the representation of ground in said district, by work on a bed-rock flume, commenced in the district below, and as to whether he knew of any custom which had grown up within the limits of this district, whereby parties were prohibited from representing mining ground in one district, by a bed-rock flume started in another, where the bed-rock flume is to drain and work all mining ground belonging to the party above the head of the bed-rock flume," were properly sustained. The written laws of the district, which presumptively were in force, required work in the district to represent ground therein. If any other custom had grown up in that district, allowing parties to represent ground by work outside of the district, it devolved upon the appellants to show it, as this would be considered an amendment to, or modification of, the former custom.

It may be further remarked, in relation to these questions, that, from all that appears, they are not proper cross-examination. All that appears from the record, in the examination of the witness in chief, is, that the witness did not know of

any custom in German district allowing ground to be represented by work outside of the district, and that he was familiar with the customs of that district.

There was not sufficient evidence to warrant the court holding that the jury would be justified in finding that German district had been abandoned or merged in a general district for Confederate gulch, called Confederate district. Hence, the objections to the third question asked by appellants of Kane, and the one asked O'Brian, in relation to the customs of Confederate gulch, were properly sustained. When there are customs upon any one subject in a district, the parties must be limited to those. The customs of an outside district could not be introduced to vary them.

The appellants' counsel asked Grubb, one of the defendants' witnesses, the following question: "If a man has a bed-rock flume in a gulch with which he designs to mine several pieces of mining ground in the same gulch, that lie separate from each other in different districts, do you know of any custom in German district that requires a separate flume for each piece of ground to represent the same?"

The first point that may be noticed in relation to this question is, that if answered in the affirmative it would show a custom in German district in relation to what would be representation in another district, and if answered in the affirmative, surely the appellants would not have been benefited, as it was not pretended that they had two bed-rock flumes. If the witness had answered in the negative, I am still unable to perceive what benefit the appellants would have derived. The written laws of the district had been introduced in evidence, and these provided for work in the district to represent mining ground therein, and as before remarked, these laws were presumptively in force, and it devolved upon appellants to show a positive custom allowing them to represent their ground by work outside of the district. The mere fact that there was no direct mining rule prohibiting ground from being represented in this way amounted to nothing. The point they were required to establish was, that there was a positive custom sanctioning

this kind of representation. A court should not reverse a case unless it appears clearly that the appellant was either actually or presumptively damaged by the error complained of.

The written customs introduced by respondents were properly received. Sufficient evidence concerning them had been introduced to raise a presumption that they were laws of the district. It is not claimed that they had possession of the other laws of the district and refused to introduce them. It was left to the jury to determine whether they were the laws of the district or not. If they found that they were *prima facie*, they were in force.

The court refused to allow the appellants to introduce evidence to the effect that at the time the laws of German district were established German district was much larger than at present, and embraced where appellants' bed-rock flume is situated.

It will be observed that appellants do not seek by this question to determine the size of the district at the time the mining ground was located by the grantors of appellants, but the size of the district at the time laws were passed. Undoubtedly those who have created a mining district may change its extent so that they do not interfere with vested rights. If these claims were located by those under whom appellants claim subsequent to the change in the size of the district, appellants could not complain, and from all that appears from the record this may have been the case. In conclusion, I may say that where it appears that mining ground could not be worked profitably without going outside the district to run a bed-rock flume or drain race to it, a custom which would require work to be done in the district to represent it, might be considered unreasonable. All mining customs must be reasonable. In this case, however, I gather from the whole record that the appellants had mining ground in the district below called Baker district. That the primary object of this bed-rock flume was to work this ground. I do not think any mining custom is unrea-

sonable which requires work to be performed directly in reference to ground in the district in which it is in force.

For these reasons the judgment of the court below is affirmed.

Exceptions overruled.

CARRHART, administrator, respondent, *v.* MONTANA MINERAL LAND AND MINING COMPANY, appellant.

DESCENT OF QUARTZ LODES. The statutes of this Territory, which regulate the descent and distribution of real property, are applicable to quartz lodes.

ADMINISTRATOR CANNOT MAINTAIN REAL ACTIONS. An administrator cannot maintain an action of ejectment for the possession of realty, or trespass for damages to the same.

Appeal from the Second District, Beaverhead County.

THIS action was tried by KNOWLES, J.

The facts are stated in the opinion. The fourth ground of the demurrer to the amended complaint was as follows: "Complaint shows that there is an administrator of the estate of George Carrhart, and defendants demur to misjoinder of parties, on the ground that the action should be prosecuted in the name of the administrator alone." The arguments of counsel upon questions that are not decided by the court are not reported.

WORD & SPRATT, for appellants.

The complaint does not state facts sufficient to constitute a cause of action. The respondent has no interest in the property, or right to the possession of the same. At common law, the realty of the deceased descends to the heir when there is no last will; in no event does it go to the administrator, nor does the administrator acquire any interest in, or right of possession to, the same. 1 Will. on Exec. 560, 568, 715; *Smith* v. *McConnell*, 17 Ill. 135; *King* v. *Jones*, 1 Eng. C. L. 223; *Emeric* v. *Penniman*, 26 Cal. 122.

The common-law doctrine has been adopted in this Territory. Acts 1865, 356. Under our statutes, the administrator can have no title, interest or right to the possession of the realty of his intestate. Acts 1865, § 1, art. 2, p. 285. He has nothing but the naked power to sell for the payment of debts, or make short leases under the direction of the probate court. The right to the possession belongs to the heirs or devisees, and they are the proper parties to sue for an injury to the same, or maintain ejectment. The administrator is not the real party in interest. Civ. Prac. Act, § 4.

Our statute of descent and distribution was in force in this Territory before the suit was commenced. Acts 1867, p. 64, § 1. The administrator cannot take any interest in the realty of the intestate. *Salmon* v. *Symonds*, 30 Cal. 301. Our administration law and the law of descents and distributions are literal copies from the laws of Missouri. The administrator cannot maintain an action of ejectment, or possess or control the realty of the intestate. *Burdyne* v. *Mackey*, 7 Mo. 374; *Aubuchon* v. *Lory*, 23 id. 99; *Sherman* v. *Dutch*, 16 Ill. 285; *Hopkins* v. *McCan*, 19 id. 113.

The decisions of California, New York and other States are based upon different statutes, that have repealed the common law and authorized the administrator to possess and control the realty.

The defendants were entitled to judgment on the facts found by the court below. The judgment is void. The respondent is a stranger to the whole matter. The respondent's claim was barred by the statute of limitations of Montana.

C. MEAD and H. N. BLAKE, for respondent.

The appellant, having filed no statement, cannot complain of any error outside of the judgment roll. *Harper* v. *Minor*, 27 Cal. 107; *Wetherbee* v. *Carroll*, 33 id. 553.

The objection that the plaintiff has not the legal capacity to sue must be raised by demurrer under that head. It cannot now be urged, under the sixth subdivision, that the

complaint does not state facts sufficient to constitute a cause of action. 2 Whit. Pr. 54; Civ. Prac. Act, §§ 40, 44, 45; *Connecticut Bank* v. *Smith*, 17 How. Pr. 487; *Bank of Louville* v. *Edwards*, 11 id. 216; *Bank of Havana* v. *Wickham*, 16 id. 97.

The judgment will not be reversed if it can be gathered from the complaint, as a whole, that plaintiff has any cause of action. *Summers* v. *Farish*, 10 Cal. 347; *Hallock* v. *Jaudin*, 34 id. 174.

An administrator may sue without joining with him the persons for whose benefit the action is prosecuted. Civ. Prac. Act, § 6. The administrator must commence and prosecute all actions which may be maintained, and are necessary in the course of his administration. Acts 1865, 288, § 23.

The administrator, under the laws of Montana, has a right of possession to the real and personal property of the deceased. Acts 1865, 271, § 14; 272, § 18; 277, §§ 46, 47; 282, § 66; 285, §§ 1, 2, 3, 4; 291, §§ 42, 43. The administrator in this action is the proper plaintiff. Defendant objected to the joinder of the heirs by demurrer, and insisted that the action should be prosecuted in the name of the administrator alone. Defendant's demurrer, fourth ground. *Harwood* v. *Mayre*, 8 Cal. 580; *Curtis* v. *Herrick*, 14 id. 119; *Curtis* v. *Sutter*, 15 id. 264; *Meeks* v. *Hahn*, 20 id. 628. The action of the court in striking out the names of the heirs as plaintiffs, if erroneous, cannot be taken advantage of by appellant. It was a ruling, requested by appellant, and appellant cannot complain of an error of court committed in its favor. *Garen* v. *Dropman*, 5 Cal. 342; *Wilkinson* v. *Parrott*, 32 id. 102.

The complaint is sufficient. *Payne* v. *Treadwell*, 16 Cal. 242; *Hallock* v. *Mixer*, id. 577; *Salmon* v. *Symonds*, 24 id. 295; *Carpenter* v. *Schmidt*, 26 id. 512; *Duncan* v. *Duncan*, 19 Mo. 368.

The act regulating descents and distributions in Montana, approved November 21, 1867, does not apply to this case, George Carrhart having died in May, 1863.

SYMES, J. This was an action brought by plaintiff as administrator against the defendant, in the nature of ejectment, for the possession of a claim on a quartz lode and damages for detention. The complaint was first filed in the name of the administrator alone; an amendment was allowed on motion of plaintiff, making several persons, alleged heirs at law, parties, an amended answer and replication filed, and then, on the trial, on motion of defendant, some of the heirs, who had been made parties by amendment, were stricken from the record, and, on motion of plaintiff, the other alleged heirs were stricken from the record, leaving the case to proceed on the amended complaint with the said administrator as sole plaintiff. The case was tried in the court below in February, 1869, a jury being waived, and judgment rendered for the plaintiff for the recovery of the quartz claim and $5,000 damages for detention. A motion for new trial argued and overruled, and appeal taken from order and errors appearing on the record.

There was no regular statement on motion for new trial, and the only question appearing for the consideration of this court is, does the complaint state facts sufficient to constitute a cause of action?

The complaint alleges that George Carrhart died in the month of May, 1863, intestate, seized and possessed among other things of claim number seven, west from discovery, on Dacota quartz lode, in Beaverhead county, Montana, containing one hundred feet on said lode; that on the 7th of November, 1864, plaintiff was duly appointed administrator of the estate of said deceased; that said estate was still unsettled, and plaintiff is still administrator thereof. Further, that William Carrhart and several other heirs, some minors, claim an interest in the estate of the said deceased, being next of kin to and legal representatives thereof; that there were no other heirs or legal representatives of deceased who have an interest in the action; that the value of the property is $5,000; that while said plaintiffs were in possession and entitled to the possession of said property, on or about the 7th day of May, 1867, the said defendants wrongfully

and unlawfully went upon and took possession of said property, depriving the plaintiffs of their true and rightful possession thereof; that they have and are continuing to hold their unlawful possession of said property, and have for a long time, *to wit:* from on or about the 7th day of May, 1867, worked and continue to work upon and mine the same, and are setting up and claiming a false and pretended title to the same to the damage of the plaintiffs of the sum of $2,500, and that they have taken and continue to take large amounts of gold quartz and other valuable minerals from the said claim and property, to the further damage of $2,500. Plaintiffs ask for possession of property, that the title set up by defendants be declared null and void, that they have judgment for damages, and that a receiver be appointed to take charge of the property during pendency of suit, and for other proper relief.

The answer denies allegations of complaint and sets up some new matter and a reply was filed; but as the only question arising is as to the sufficiency of the complaint to sustain the findings and judgment of the court below it is unnecessary to consider them. Two questions are involved in the decision of this case:

First, is the property sued for in this action real estate?

Second, if so, can the administrator, as such, sue for and recover possession and damages done to the realty after death of decedent and for withholding the same? By the statute law of this Territory all claims on quartz lodes or mineral are made real estate, and it provides that they shall descend to their heirs and assigns. Act December 26, 1864. And quartz claims have been treated and governed by the rules applicable to real estate by the supreme court of California. We are of opinion that quartz lodes in this Territory are to be governed by the rules applicable to the descent and distribution of realty.

Second, it is unnecessary to dwell upon the common-law doctrine that all realty descends to, and vests in, the heirs on the death of the testator, and that the executor or ad-

ministrator cannot maintain ejectment for possession, or trespass for damages to the same.

Does the statute law of this Territory change the common law so as to give the administrator this right? The chapters of our law in regard to descents and distributions and administration of estates are almost literal copies from the Missouri statute; and the first, second, third and forty-second sections of the chapter governing administration — which are relied on, in this case, by respondents to sustain the position that the administrator, as such, can maintain ejectment for real estate of deceased — are, in effect, the same. It is contended that the act relating to descents and distributions, passed November 21, 1867, and which provides that all real estate should descend to the heirs or devisees, being after death of decedent herein, although before commencement of this suit, does not govern in this case. But this is immaterial as it is, as to the question in this case, declaratory of the common law.

In *Burdyne* v. *Mackey, executrix of Mackey*, 7 Mo. 374, 375, the question is discussed; and the court, SCOTT, J., say, "that it is not contended that the right of an executor or administrator to maintain ejectment, or that the title to realty vests in him, has any countenance at common law." That this right must be derived from statute, and it must be supposed that such an innovation, so much at variance with the opinion of all those instructed in the science of the common law, the introduction of which into our Code must unsettle and disturb so many principles heretofore established, should derive its existence, not from mere implication, but from express enactment. And in *Aubuchon* v. *Lory*, 23 Mo. 99, which was an action of trespass by an administratrix for damage to real estate of decedent, the court cited the common law to show that it cannot be maintained, and state that the statute which gives the administrator power to sell for payment of debts, and to make short leases, under direction of the probate court, vests no interest in the real estate in him. Although our statute provides, in the section referred to — being the same as the

Missouri statute — that the administrator shall take possession of all evidences of title to real estate, and make an inventory of all real and personal estate, and sell the same on petition for the payment of debts, and make leases of the same, not longer than one year, under direction of the probate court, that does not, under the construction given by the supreme court of Missouri, vest any title or interest in the administrator, or give him the right to maintain ejectment. We think the construction given by the supreme court of Missouri correct in principle, and according to the intention of the legislature. Had the legislature intended to vest the title or possession of the realty, for the purpose of administration and distribution to the heirs, in the administrator, they would certainly have provided for his taking possession of the same; but they provide for his taking possession of the evidences of title and returning inventory of realty, and not for taking possession thereof — evidently intending that he should look after the realty for the benefit of the heirs. And, also, under the direction of the probate court, he may lease it, not longer than one year evidently meaning until the heirs can be notified and take possession. The authorities referred to by respondent in California, to sustain their position, are under special statutes, and have no force here.

The complaint in this case alleges that the plaintiffs, the administrator and heirs, were, after the death of the deceased, and before the commencement of the suit, the owners, and in possession of the quartz claims sued for; and that, being in possession, the defendants unlawfully ousted them, and still hold possession, and have been taking out quartz ore, and thereby damaged the realty $5,000. Before the trial all the heirs were stricken from the record, leaving the allegations of the complaint the same, to wit: that they were the owners in possession, and have been ousted therefrom by the defendants. Upon these allegations judgment was rendered for the plaintiff, the administrator, for the recovery of the possession of said property, and $5,000 damages for ouster and detention. The allegations of the complaint are

not sufficient to support this judgment, and it must be reversed.

The case seems to have been tried below without this question having been argued, for the names of the heirs were all stricken from the record on the suggestion of both parties.

Judgment reversed and cause remanded.

New trial granted

TERRITORY EX REL. FISK, respondent, *v.* RODGERS, appellant.

PLEADING — *insufficient denials — issues.* An answer that "denies legally and lawfully" the allegations of the complaint, raises no issue of fact.

TERRITORIAL AUDITOR — *appointment by governor and council.* Under the organic act of this Territory, the office of territorial auditor must be filled by the governor, who nominates and, by and with the advice and consent of the legislative council, appoints a person to fill said office.

STATUTORY CONSTRUCTION — *statute relating to election of auditor void.* The act approved November 16, 1867, which provides for the election of a territorial auditor by the legislative assembly and the voters of the Territory, conflicts with the organic act and is void; such an election confers no right upon the party claiming the office.

AUDITOR NOMINATED BY GOVERNOR — *confirmation by council.* A person, who has been nominated by the governor to fill the office of territorial auditor, has no right thereto until the legislative council has confirmed the nomination.

GOVERNOR CANNOT FILL CERTAIN VACANCIES IN OFFICE. The governor has no authority from the organic act, or the legislative assembly, to fill a vacancy in the office of territorial auditor.

OFFICE OF TERRITORIAL AUDITOR. The legislative assembly has created the office of territorial auditor, and can abolish it.

Appeal from the First District, Madison County.

THE facts are stated in the opinion. The judgment was rendered by WARREN, J.

WORD & SPRATT and WOOLFOLK & TOOLE, for appellant.

The governor cannot fill the office of territorial auditor by appointment, after he has exercised the appointing power

in the first instance, under section 7 of the organic act. The expression of one thing is the exclusion of all others. The organic act provides the manner of filling the office and defines the powers of the executive. Smith's Const. Law, 667, 677, 778, 790; 2 Story's Const. 403, 1542, 1543; *People* v. *Langdon*, 8 Cal. 15; *People* v. *Whitman*, 10 id. 46.

There was no vacancy for the governor to fill. The legislative assembly can provide for the filling of vacancies during the recess of the council, if the organic act is silent thereon. *People* v. *Oulton*, 28 Cal. 44; *People* v. *Tilton*, 37 id. 618; *Bourland* v. *Hildreth*, 26 id. 161. The governor exhausted his appointing power in the first instance, and the office became vacant by force of the organic act. The legislature has ever since filled the vacancy, and the incumbent held by virtue of the laws, which the legislature had a right to make. *Tappan* v. *Gray*, 9 Paige, 507.

The law creating the office of auditor provides that the incumbent shall hold over till a successor is qualified. Acts 1865, 533–539.

The governor cannot declare a vacancy. There is no finding or admission in the proceedings that any proper tribunal had declared the office vacant at the time respondent was appointed. Was the office of auditor vacant by operation of law? If there was a vacancy, the legislature had the power to provide the manner of filling it, and this mode must be strictly followed. Acts 1869, 88, § 2; Smith's Const. Law, 790.

The governor has no right to remove officers. The legislature has limited this right to a single cause. Acts 1867, 73, § 8; *Tappan* v. *Gray*, 9 Paige, 507; *People* v. *Carrique*, 2 Hill, 93.

The court finds that appellant's term of office expired in 1869 at the general election. The statute declaring in what cases vacancies occur applies to events occurring before the expiration of the term of office and cannot be extended to include other cases. Acts 1867, 72, § 7. Section 2 of the Laws of 1869 repeals the ninth section of the Laws of 1867,

page 73. These statutes cannot be construed together. By repealing the section providing for the governor alone to fill vacancies, and providing for the same to be filled by the governor and legislative council, the legislature intended that the governor alone should not fill such vacancy. 2 Story's Const. 405, 1544.

The law makes no distinction between *de facto* officers. Respondent must show a perfect right to the office of appellant. There must be a vacancy and respondent must be appointed and qualified according to law. *People* v. *Smyth*, 28 Cal. 21; 18 Mo. 341.

The predecessor of appellant surrendered up the books and records and appellant was holding as his successor. There was no such vacancy as would authorize the governor to act. The office of auditor is never vacant when there is any one exercising its functions. The incumbent has the custody of public records. *People* v. *Whitman*, 10 Cal. 38; *People* v. *Oulton*, 28 id. 44; *People* v. *Stratton*, id. 382; *People* v. *Van Horn*, 18 Wend. 518.

Congress authorized the legislature to re-enact the law providing for the election of auditor, and it is valid. 2 Story's Const. 1537. When the law provides that one can hold office until his successor is qualified, the right so to hold, after the expiration of his term, is a tenure by law. *People* v. *Sanderson*, 30 Cal. 160. The statutes prescribe the mode of removing an officer, and it can be done in no other way. Civil Prac. Act, §§ 310–316; *People* v. *Carrique*, 2 Hill, 104.

The courts will not declare an office vacant, and leave the books and records without a custodian. *Tappan* v. *Gray*, 9 Paige, 507.

The right of respondent to recover the office has abated during the pendency of this appeal. Civil Prac. Act, § 16; Sup. Ct. Rule 15.

W. F. SANDERS and H. N. BLAKE, for respondent.

The office of territorial auditor is appointive. Organic Act, § 7. Sections 3 and 4 of the act of November 16, 1867 (p. 72), conflict with the organic act, and are void.

The claim of appellant to hold said office, being based on said act, is invalid.

The appellant was never nominated or appointed by the executive of Montana. The respondent was so nominated and appointed. It was necessary for the governor to so act to confer authority on any person to fill the office of auditor. Organic Act, §§ 2, 7; Acts 1869, 88.

The election of appellant was illegal, and the office was vacant. The executive, by appointing respondent auditor, thereby removed appellant. *Ex parte Hennen*, 13 Pet. 139, 2 Impeach. of Johnson, 160, 201, 202, 315–317.

The organic act gives the governor the power of removal, and the legislature cannot impair it. Under similar provisions the power of the executive to remove certain officers has been conceded for two generations. 1 Kent, 316; 2 Impeach. of Johnson, 315.

The organic act requires the executive to take care "that the laws be faithfully executed." § 2. These words are borrowed from the United States constitution, and have a definite meaning. Congress intended to weave that meaning into our form of territorial government. Smith's Const. Law, § 482; U. S. Const., art. 2, §§ 1, 3.

The office of auditor is in the executive department. Was there a vacancy in the office August 28, 1869, in contemplation of law? *People* v. *Parker*, 37 Cal. 639. Appellant never held the office *de jure*. Appellant's argument, in practice, gives the executive power to the legislature, and allows it to tie the governor's hands so that he cannot see that the laws are faithfully executed. A part of the power to enforce those laws must be the turning out of an intruder from an executive office. The cases cited by appellant, of an officer *de jure* holding beyond his ordinary term, are decided upon the principle that the holding over is a part of the legal term. They do not justify an intruder *ab initio*. The limitation on executive power by the legislature, requiring that permanent appointments shall be made with the advice and consent of the council, does not apply to a case of removal where such concurrence is not required.

No finding of facts is necessary where a judgment is rendered on the pleadings. *Taylor* v. *Palmer*, 31 Cal. 242. In this case no facts, but legal conclusions were put in issue.

Rule 15 of the supreme court, and section 16 of the civil practice act, do not apply to this case. The people, who are parties, are neither dead or disabled, nor have they sold out.

Appellant's denials are wholly of conclusions of law. Such denials raise no issue of fact. *Wedderspoon* v. *Rogers*, 32 Cal. 569; *Curtis* v. *Richards*, 9 id. 33; *Busenius* v. *Coffee*, 14 id. 91; *Frisch* v. *Caler*, 21 id. 71; *Nelson* v. *Murray*, 23 id. 338; *Richardson* v. *Smith*, 29 id. 529.

SYMES, J. This was an action brought under title 7, chapter 5 of the Civil Code, for the usurpation of the office of territorial auditor, by the people of the Territory upon the relation of James L. Fisk, and James L. Fisk, who claimed that he was entitled to the possession and emoluments of said office, against W. H. Rodgers, the present incumbent.

The complaint alleged in substance that plaintiff Fisk had been duly appointed and commissioned by the governor to the office of territorial auditor; that plaintiff had taken the oath and filed the proper official bond; that he had demanded possession of the said office from said defendant, but defendant refused to give up possession and wrongfully and unlawfully held and intruded himself into the said office. Further, that defendant claimed said office by virtue of an election by the legislative assembly of the Territory, which was illegal; and ask judgment for possession of the office.

Defendant answered and admitted being in possession of the office; denied that plaintiff was lawfully appointed or entitled to the possession of the said office; that he had been duly elected and appointed to the said office by the legislative assembly and the governor in December, 1867; and that he was duly elected by the qualified voters of the Territory to said office in August, 1869, in accordance with the

law of the Territory, and was entitled to hold and enjoy the emoluments of the same.

The plaintiff moved for judgment on the pleadings, which motion was sustained by the court, and judgment rendered that defendant was not entitled to have and enjoy possession of the said office, and that the plaintiff had been duly appointed to and was entitled to the possession and emoluments of the said office, and ordering the defendant ousted from, and the plaintiff put into the possession of, said office. From this judgment the defendant appealed to this court.

There was no error in the court below proceeding to consider the case and rendering judgment on the complaint and answer. The answer raises no issue of fact; it admits the allegations of the complaint, or denies *legally* and *lawfully* the rights set up in the complaint, such denials being pregnant with the admission of all the facts claimed, only denying the legal conclusions resulting therefrom.

The decision of this case involves the consideration of two distinct propositions, first, whether the defendant, the incumbent, is lawfully entitled to hold and enjoy the office, or is an intruder into the same; and second, whether the plaintiff Fisk has been legally appointed to said office, and is entitled to the possession and enjoyment of the same.

The defendant, as appears by the pleadings, took possession of the said office on the 29th of November, 1867, by virtue of an election by the two houses of the legislative assembly of the Territory of Montana and the commission of the governor, which election and commission was in accordance with an act of the legislative assembly, approved November 16, 1867. That defendant was so elected and appointed to the said office to hold the same until the general election on the first Monday in August, 1869; and that at said general election he was elected and chosen by a majority of the qualified electors of the territory, and took the proper oath of office, and offered to file an official bond, but the secretary of the Territory refused to recognize the said election as legal and refused to file the bond, and the governor refused to issue a commission under said election

The election and appointment by the legislative assembly and governor in November, 1867, and the election by the people on the first Monday of August, 1869, was in accordance with the provisions of the said act of the legislative assembly, and the question presents itself, is the said act in contravention of the provisions of the act of congress, entitled "An act to provide a temporary government for the Territory of Montana," known as the "organic act," and therefore null and void.

Section 7 of said organic act provides that all township, district and county officers not therein otherwise provided for shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly; and that the governor shall nominate and, by and with the advice and consent of the legislative council, appoint all officers not therein otherwise provided for. The office of territorial auditor is not a township, district, or county office, but is a territorial office, and is, consequently, not to be filled in such a manner as the governor and legislative assembly may provide; but is an office not in the organic act otherwise provided for, and must be filled by the governor nominating and, by and with the advice and consent of the legislative council, appointing a person to hold said office.

So much of the act of the legislative assembly, approved November 16, 1867, as provided for the election by the legislislative assembly, or by the election of the Territory, of territorial auditor is in contravention of the organic act and of no force; and the defendant Rodgers claiming to hold and exercise the duties of said office only by virtue of the provisions of said act of the legislative assembly has no lawful right to the possession and emoluments of said office: and the district court below did not err in adjudging that said Rodgers was not entitled to the office and ordering that he be ousted therefrom.

2. The plaintiff and relator Fisk claims the possession and emoluments of said office by virtue of a commission from the governor of the Territory, dated August 28,

1869, appointing him to be territorial auditor until the next session of the legislative council of the Territory. Has the governor the power of appointment to fill such office, or are his powers limited by the language of the organic act, before quoted, to simply the power of nominating and appointing only, after he shall have received the advice and consent of the legislative council. It is stated in the complaint that the plaintiff was nominated and appointed to the said office, which nomination would be subject to the advice and consent of the legislative council; and that he gave bond and took the oath prescribed by law, whereupon a commission was issued appointing him. The nomination only could give the plaintiff no right to the possession of the office until the legislative council had confirmed the nomination, and he was commissioned and appointed in accordance with the advice and consent of the legislative council or confirmation.

The word "nominate" means to recommend for confirmation. Paschal's Annotated Const. 175, note 179; *Marbury* v. *Madison*, 1 Cr. 137. If the plaintiff has any right, it is by virtue of his appointment and commission.

The language of the organic act, conferring the power of appointment on the governor, is the same as that portion of section 2, article 2 of the constitution of the United States, giving the president the power of nominating and appointing officers. But there is another clause in section 2, article 2, which expressly empowers the president to fill all vacancies which may happen during the recess of the senate, by granting commissions which shall expire at the end of the next session. There is no such express power given to the governor to fill vacancies in our organic act. The court is of opinion that there was a vacancy existing when the governor issued the commission to the plaintiff, Fisk; but it has been held that the power of appointment carries with it the power of removal. Stanbery's Opinions, 18, 19, and authorities cited.

The legislative assembly passed an act in 1865, giving the governor the power to fill vacancies which should happen

during the recess of the legislature, and in the act approved November 16, 1867, making the office of auditor and others an elective one by the people, the governor is empowered to fill vacancies by appointment until the next general election. But, in an act approved December 31, 1868, it is provided, that vacancies happening shall be filled until the next general election by the governor, by and with the advice and consent of the legislative council, and repeals the former acts giving the governor, alone, the power to fill vacancies.

If there is no express law or authority conferring on the governor of the Territory the power to fill vacancies by appointment, or any appointing power, as distinguished from the power to recommend, select or nominate, and appoint only after having obtained the advice and consent of the legislative council, has the governor the inherent executive or incidental power? There are no decisions direct upon this question reported in the supreme court of the United States, because the third clause of the second section, second article of the constitution, expressly confers the power of appointment to fill vacancies on the president. And we have at hand no State constitution similar to our organic act, and, therefore, no decisions to enlighten us. We might be led to the conclusion, that the framers of the constitution thought that provision of the constitution, section 2, article 2, which is the same as our organic act, did not confer on the president the power to appoint to vacancies, without the consent of the senate, or they would not have inserted the third clause, expressly conferring the power, still, we may gather from the dictum of judges and the opinion of attorneys-general, that it would be held that the president, under some circumstances, would have the inherent executive power to appoint officers, under that provision of the constitution, making it his duty to see the laws faithfully executed.

It is contended by counsel for relator and plaintiff Fisk, that the governor had the power and authority to appoint under that clause in the organic act, making it his duty to see the laws faithfully executed. We may be of the

opinion, that the president would have the power outside of the third clause, section 2, article 2, of the constitution, to appoint, during the recess of the senate, to fill a vacancy occurring in any of the executive offices necessary to carry on the machinery of the executive department of the government. A vacancy might occur in the office of secretary of state, or war, whereby the government would be seriously embarrassed and injured, if the president did not appoint persons to carry on that part of the executive department, and his power to do so might be maintained under the doctrine of *ex necessitate.* We might reason from analogy, that, if a vacancy should occur in the office of secretary of the Territory during the recess of the legislature, and the law as to filling the office was the same as that providing for filling the office in question herein, the governor would have the inherent or incidental executive power to appoint to the vacancy, because the duties pertaining to the secretary's office must be performed, in order to carry on the machinery of the executive department of the government of the Territory. But the office of auditor bears no such relation to the executive department of the Territory. The office of auditor is not created or referred to in the organic act creating the territorial government, in any of its provisions relating to any of its departments or the officers thereof. It is an office created by the legislature of the Territory. The legislative assembly can abolish the office when it chooses, and the executive and other departments of the government of the Territory can go on the same. The auditor has nothing to do with the financial part of the territorial government as regulated by congress. He does not settle or audit the accounts or salaries of the officers of the executive, legislative or judicial department of the Territory, so far as they are paid by the general government.

Being an office created by the legislature of the Territory, the appointment to which comes under that clause of section 7 of the organic act, of officers not therein otherwise provided for, and which the governor is empowered to nominate and, by and with the advice and consent of the legis-

lative council, appoint, we are of opinion that the commission given by the governor to the plaintiff, Fisk, purporting to appoint him to the office of territorial auditor, without the advice and consent of the legislative council, does not confer the right to the possession and emoluments of the said office on said Fisk.

In reply to the queries of counsel, that if the governor has not the power of appointment to fill vacancies during the recess of the legislature, who has, we would say that when the legislative assembly create an office, the appointment to which under the organic act they have the power to control by their advice and consent, the governor having only the right or authority of selecting or nominating, and they enact that a vacancy in the office shall only be filled by the governor and legislative council, it is not the province of the court to legislate for a contingency, or direct how the proper authorities should proceed.

So much of the judgment of the court below as adjudges that the defendant Rodgers is not entitled to hold said office, and that he be ousted from the same, is affirmed, and that part adjudging the respondent Fisk entitled to the possession and enjoyment of the said office, is reversed.

Judgment affirmed in part and reversed in part.

MASON et al., respondents, *v.* GERMAINE et al., appellants.

PRACTICE — *default — judgment after appearance.* A default cannot be entered against a defendant, after he appears, but judgment can be rendered against him for want of an answer.

PRACTICE — *intermediate orders reviewed.* On appeal from a judgment, this court will review intermediate orders that affect the judgment.

PRACTICE — *suits consolidated.* Suits cannot be consolidated, unless the parties are the same and the subject-matter can be joined.

PRACTICE — *mechanics' liens — one trial — one sale.* The rights of all the parties to an action, that claim liens upon the same premises under the act "securing liens to mechanics and others," must be adjudicated in one proceeding, and the several liens of the parties should be satisfied out of the proceeds of the same sale of the incumbered property.

PRACTICE — *questions of fact not considered without the statement.* On appeal from an order refusing a new trial, questions of fact will not be considered, unless all the evidence is brought before the court in the statement.

PRACTICE — *errors not reviewed.* Errors of law that are immaterial or not properly specified will not be reviewed.

PRACTICE — *stipulation not in the statement.* The stipulation of attorneys, that is not embodied in the statement, will be disregarded on appeal.

PRACTICE — *presumption in absence of evidence.* This court will presume, in the absence of the evidence, that the court below found the facts correctly.

MECHANIC'S LIENS — *excessive claims — fraud.* A party who, without any fraudulent intent, claims in his complaint and notice of lien a larger amount than that found by the court, does not destroy his lien for the amount actually due.

ASSIGNMENT OF MECHANIC'S LIEN. The lien of a mechanic for labor that has been performed, follows the assignment of the account of the labor.

PRACTICE — *process, if court makes one a defendant.* No process is required when the court orders that a person be made a defendant, and all the parties to the action are charged with notice thereof.

STATUTORY CONSTRUCTION — *statute prefers liens of mechanics.* The act passed December 30, 1864, "securing liens to mechanics and others," gives preference to the liens of mechanics and material men over any incumbrance made after the building is commenced. WARREN, C. J., dissenting.

Appeal from the Third District, Lewis and Clarke County.

THIS action was tried by SYMES, J., at the April term, 1870, and a decree was made in favor of Mason *et al.*, plaintiffs. The facts appear in the opinion.

WOOLFOLK & TOOLE, for appellant, Germaine.

The court erred in refusing to consolidate and require all the parties to litigate their rights in one action. Acts 1865, §§ 11, 12, 13.

The allegations of the complaint will not support the prayer thereof. Civ. Prac. Act, § 39; 1 Edw. Ch. 654; 1 U. S. Eq. Dig. 278, 280, 281, 292.

The statement of facts agreed upon was in the nature of a special finding. The answer denies the contract sued on, and the statement will not support the contract. The appellant could set up the true contract in his answer to defeat the respondents. *Murphy* v. *Napa County*, 20 Cal. 497.

The agreed statement would only support a personal judgment, if any. A contract is necessary to support a lien. *Houghton* v. *Blake*, 5 Cal. 240; *Brewster* v. *Hartley*, 37 id. 15; *Walker* v. *Hauss-Hijo*, 1 id. 183.

The mechanic's lien law is in derogation of the common law, and a party claiming rights under it must show a strict compliance. Respondents never complied with sixth section of the Acts of 1865, page 333.

There was no evidence to support the contract. Appellant never agreed that judgment should be rendered against him. The variance between the findings, evidence and decree is fatal. Respondents' contracts, as set up in their complaint, will not support liens. No definite time for doing the work is alleged. Houck on Liens, § 135. The findings do not show that the contracts were made and services rendered upon the property described.

McKillican had no right to assign to Bilsland. Houck on Liens, § 199.

CHUMASERO & CHADWICK, for appellant, Davis.

The decree of the court below was erroneous. Bilsland commenced work on July 16, 1869, and completed on November 10, 1869. The mortgage of Davis was made and recorded on June 9, 1869. The lien of a mechanic can only date from the time he commenced work. In Missouri, under a similar statute, the lien begins when the first work is performed. *Dubois' Adm'r* v. *Wilson's Trustees*, 21 Mo. 213. No authorities are cited by the court to sustain its ruling. Such a construction is unconstitutional, as impairing the obligation of contracts and interfering with vested rights.

Houck on Liens, §§ 50, 54. In Missouri, the court has receded from its position in 21st Missouri. 39 Mo. 170.

In Iowa, the court held that the lien attaches at the commencement of the work. Houck on Liens, § 142.

The lien law must be strictly construed. *Brady* v. *Anderson*, 24 Ill. 112; *Philip* v. *Stone*, 25 id. 80; Houck on Liens, § 70.

The decree was rendered for more than was due under any circumstances. The assignment of the indebtedness by a mechanic could not convey the right to a lien. Houck on Liens, § 198.

There is nothing in the evidence or findings of the court which justifies the decree in foreclosing Davis from all equity of redemption. The finding is that respondent, Bilsland, is entitled to a lien, but not that such lien is prior to the mortgage of Davis.

SHOBER & LOWRY, W. F. SANDERS and J. A. JOHNSTON, for respondents.

Mechanic's liens attach from the time of the commencement of the building and have priority over all incumbrances made subsequently. Acts 1865, 334, § 8; *Dubois' Adm'r* v. *Witson's Trustees*, 21 Mo. 214; 1 Hill. Real Prop. 492, § 40; Acts 1867, 80; Houck on Liens, 163; *Jones* v. *Swan*, 21 Iowa, 183; *Cogel* v. *Mickow*, 11 Minn. 475.

A mortgagee must examine the premises and see that they are free from the liens of laborers. Houck on Liens, § 50.

It is not necessary to state with whom the contract was made. *Hauptman* v. *Catlin*, 20 N. Y. 247.

Courts favor mechanics and construe the law liberally in their favor. Houck on Liens, §§ 66-68.

Every fact not found will be presumed to be in accordance with the judgment. *Emmal* v. *Webb*, 36 Cal. 197. The facts found are sufficient to sustain the judgment.

The denials of appellants respecting the liens are worthless, because they deny conclusions of law. *Wedderspoon* v. *Rogers*, 32 Cal. 569; *People* v. *Supervisors*, 27 id. 655; *Landers* v. *Bolton*, 26 id. 416.

WARREN, C. J. On the 25th day of November, A. D. 1869, the respondents filed their complaint in the district court of the third judicial district in and for Lewis and Clarke county, to enforce a lien for work done and materials furnished by plaintiffs upon and for a certain building erected upon certain lots situated in the town of Helena, described in the complaint, under a contract with the owner, G. Jules Germaine, one of the defendants. The other defendants are made parties to the proceeding upon the ground of interest in the property sought to be charged, claimed by them respectively, which is alleged to have accrued subsequent to plaintiffs' lien. It does not appear that summons issued, but defendants Davis and Germaine answered separately, and the court finds in the judgment rendered that all the defendants except Germaine, Davis, Dahler and Wyttenbach appeared to the action, waived service of summons and that default was regularly entered against them respectively. After appearance of a defendant in an action default cannot be entered against him, but judgment can be rendered by *nil dicit* or for want of answer, and such is substantially the course pursued in this case.

On the same day, November 25, 1869, John Bilsland, one of the defendants in this suit, filed his complaint in the same court, to enforce a mechanic's lien upon the same building and lots, making the plaintiffs in this suit, together with his co-defendants herein, parties defendant in that proceeding, and on the same day defendants Clark, Conrad and Curtin, commenced a proceeding, in the same court, for the purpose of enforcing a lien for materials furnished for the same building, and in which the same parties are impleaded.

On November 27, 1869, William P. Wilder and John Slimely, D. B. Dressley, Samuel Davenport, E. L. Curry, respectively; and on November 29, 1869, Barnes and Arnold, as partners; and on December 14, 1869, R. S. Hale; and on February 10, 1870, Benjamin Daily; and on February 12, 1870, D. B. McKillican, each being a defendant in this suit, separately commenced a suit to enforce their several liens against the same property, and impleading the parties to

this suit, in each proceeding. Afterward such proceedings were had in each one of said suits, that judgment was rendered in favor of the respective plaintiffs, and in each case a separate decree of sale of the property was entered to satisfy the lien found.

In each one of these several proceedings defendant Germaine entered a motion for an order to consolidate these actions, and also to require the plaintiffs therein to litigate their respective claims in one action, and that all matters adjudged between the parties should be embraced in one decree. These motions were each overruled by the court.

Upon appeal from a judgment this court will review intermediate orders affecting the judgment, and we will first consider the order overruling these motions, as affecting the question of costs, and the rights of the parties appealing.

A consolidation of suits is only ordered where the parties, plaintiff and defendant, are the same in each, and the subject-matter such as may be joined, so that this was not properly a question of consolidation of the suits. The practice and proceedings, however, under the act in question are the same as in other civil actions. The remedies under it are two-fold — an ordinary judgment, and, in the event no sufficient property be found, enforcement of the lien established by sale of the property charged. As between themselves the several lienholders take priority in the order of filing their accounts and notices of lien with the county recorder.

Where separate suits are commenced, the plaintiffs in which are not united in interest, and several judgments are sought, joinder of their actions would be improper, but in so far as the statute provides for enforcement of the liens created by it against the same property in favor of several lienholders, the action under it is in the nature of an equitable proceeding, and should be governed by the rules pertaining to such.

It is not necessary to determine at this time whether in a suit instituted under the act a party may recover a judgment at law for the amount found due to him, notwithstanding

his failure to establish a lien therefor. So far as the liens are concerned, the several lienholders are to be regarded as incumbrancers of the same property sought to be charged, and their respective rights adjudicated as such. The "act securing liens to mechanics and others," provides that parties to the contract shall, and all others interested may, be made parties, but at the same time the practice in other civil cases is made applicable under it, and, under our practice, a defendant is required to answer the complaint, specifically, and also to set up as a counter-claim any matter which entitles him to relief, either against the plaintiff or any co-defendant. It is not permitted him, after the court has acquired jurisdiction over him in a cause either by service of summons or by voluntary appearance, to suffer a default or fail to answer, and then institute a separate action in which the same subject-matter and parties are involved. While different lienholders need not necessarily be made defendants unless it is sought to bind them by the decree, yet if made defendants, as in this case, their rights must be adjudicated in one proceeding so far as their several liens are concerned.

None of the parties in these causes have appealed to this court except Germaine, who appeals separately in each, and Davis, who appeals in the proceeding in which Bilsland is plaintiff below. There is manifest injury sustained by these appellants in permitting each one of the defendants in this cause to maintain a separate action for the enforcement of his lien, and in each entering a decree of sale of the property, when, under our practice act—as well as under the established chancery practice—the rights of all should have been determined in one action, and the several claims established as liens, ordered satisfied out of the proceeds of one, and the same sale of the property charged.

By the course pursued the appellants are not only harrassed by multiplicity of suits, and subjected to accumulation of costs, but suffer from possible sacrifice of the property, in consequence of the twelve sales ordered. It may be remarked, also, that the several lienholders, although

not appealing, sustain injury in consequence of the proceeding. It is claimed that each has the right to redeem from the preceding sale or sales ordered, but this is not adequate protection of his rights, and may be substantially a denial of them. Mechanics and material-men are not always men of capital; and to require junior lienholders to pay off all prior liens, in order to protect their own liens, defeats the purpose of the act.

We hold, therefore, that the court erred in overruling the motion of defendant Germaine, to require the defendants to submit their respective rights for adjudication in one action; but we feel authorized, as an appellate court, to correct this error, and to treat the several complaints filed as counter-claims, set up by them respectively; and since the motion of Germaine was filed in each case, and since this action, in which Mason and Duke are plaintiffs, is the first cause on the calendar of this court, commenced on November 25, 1869, in the court below, we will regard said complaints as counter-claims in this cause, and will review the transcripts in the order in which they stand on this calendar, and having reference, also, to the date of filing below.

Before considering the questions raised in each case separately, we will first pass upon questions applicable to all equally. In each case defendant Germaine appeals from the judgment rendered, and from the order overruling his motion for a new trial. This he may do; but, upon appeal from a judgment, not accompanied by a statement, this court will only review errors of law appearing on the record itself, properly specified. Upon a motion for a new trial there must be, in every instance, either a statement, signed by the attorneys of the parties, or settled and certified by the judge, or affidavits, showing the errors alleged. No question of fact will be considered in this court, unless all the evidence relating thereto be embodied or definitely referred to in the statement; nor will any error of law be regarded unless material, and properly specified in the statement. Mere recitation in the transcript of what purport to be facts or stipulations of attorneys, not embodied in or

distinctly identified by the statement, will not be considered. In this case, in every instance, that which purports to be a "statement" is, more properly, a notice of a motion for a new trial than a statement, and, in no instance, is the evidence embodied or definitely referred to; and, hence, it will be presumed in this court that the evidence was sufficient to support the finding of facts in the court below, and we will be confined to examination of errors in law appearing upon the record and properly specified. The several notices of appeal specify that the respective appeals are from the "findings" of the court below, as well as from the judgments and orders overruling the motions for a new trial, and we will remark that no appeal lies from the "findings" of a court which correspond to the special verdict of a jury. The "statement" on the motion for a new trial, in each instance, specifies as grounds for the motion, in addition to error of law and insufficiency of the evidence, "irregularity in the proceedings of the court." The "irregularity" mentioned in the statute refers to irregularity in the proceedings, not appearing on the face of the record, and must be shown by affidavit. The "irregularities" specified in the several statements are not of this character, but appear on the record and we will so consider them.

In the case under consideration, wherein Mason & Duke are plaintiffs, the first error of law specified is the overruling of the demurrer of appellant, Germaine, to the complaint. The demurrer we hold to have been properly overruled, as the facts stated constitute a cause of action.

The order overruling the motion to require defendants to litigate their respective rights in this proceeding we have already considered, and the error assigned in rendering the decree of course depends upon the determination of the other questions presented.

The second ground of the motion for a new trial is, "insufficiency of the evidence to support the findings and decree:" but, as we have already stated, all the evidence not being preserved and embodied in the statement settled, we must presume in favor of the judgment below.

There appears in the transcript a stipulation signed by the attorneys of the respective parties, as to the amount due plaintiffs, and also an entry reciting the examination of witness upon certain matters and the allowance of $75 as damages by the court for a defective range and flue, but both of these, neither forming a part of the record nor being embodied in a statement, will be disregarded.

The fact that the complaint and notice of lien claimed as due plaintiffs a larger amount than that found by the court will not destroy their lien for the amount actually due, unless there be a fraudulent intent in filing the same, which must be proven and will not be presumed.

Upon the other points specified, the evidence necessary to sustain them not being preserved, the presumptions are in favor of the judgment below.

The court finds that the building in question was commenced May 21, 1869; that thereafter plaintiffs, Mason & Duke, under a contract with the owner, defendant Germaine, furnished material for and performed labor on the same, and within sixty days after completion of said contract, and on September 29, 1869, at 2¼ o'clock P. M. of said day, duly filed their notice of lien and account in the county clerk's office of said Lewis and Clarke county, and that there was due plaintiffs therefor $5,215.46, for the payment of which they were decreed a lien on the property described.

In the case of *John Bilsland*, defendant Germaine appeals from the order overruling his motion for a new trial; and defendant Davis appeals from the decree therein rendered as against him. Under our view, the appeal of Davis in this case is as effectual as if he had appealed in all, and his rights and priority as mortgagee can be determined fully, and we will consider these questions hereafter.

In the order overruling Germaine's motion for a new trial, a statement has been referred to as having been settled by the court, although none is certified by the court. Some evidence is set out in the transcript, but it is not certified, nor does it purport to be all the evidence, and the presumptions favor the judgment below. The error assigned in

overruling the demurrer to the complaint, and in admitting proof of and sustaining the assignment of McKillican's lien to plaintiff, we do not think well grounded. While a lien is inchoate, and before the completion of the contract, an assignment of the claim for labor or materials would not carry a lien, but we can see no reason in law, public policy, or principle, why a lien, when perfected, should not follow the assignment of the claim on which it is founded. The other errors assigned we have considered.

The court finds the plaintiff entitled to a lien for $2,064.75, and that he duly filed his notice of lien for $742.87½ on November 17, 1869, at 2 o'clock P. M., and that McKillican at the same time duly filed notice of his lien for $1,242.50. It is evident the court allowed interest upon these claims, and to sustain this ruling it must be presumed there was evidence before it that the amounts were vexatiously withheld. In the following cases no new questions are raised. The court finds Clark, Conrad and Curtin entitled to a lien for $627, and that notice of lien was filed November 22, 1869; that D. B. Dressler is entitled to a lien for $566.50, and that notice of lien was filed November 17, 1869; that William P. Wilder is entitled to a lien for $1,505.75, and that notice of lien was filed November 17, 1869, by himself, for $771.78, and on the same day at 10 o'clock A. M., by John A. Murphy, for $734, and that Murphy duly assigned his claim and lien therefor to Wilder; that John Slimely is entitled to a lien for $400, and filed his notice of lien on November 17, 1869, at 11½ o'clock A. M.; that Barnes & Arnold are entitled to two liens, one for $5,277.69, notice of which was filed November 17, 1869, at 11½ A. M., and the other for $1,037.87, notice of which was filed November 11, 1869. In this case the court made John Kinna a party defendant on his own motion. Kinna filed his answer setting up a lien on the property, for work done upon and materials furnished for the same. This was proper practice. The "objections" of appellant, though not properly presented, we will review.

The first is, that appellant was not served with process,

and did not appear in such proceeding. The order made by the court, making Kinna a defendant in the cause, charged all the parties with notice, and no process was required. Each party, however, was entitled to service of a copy of his answer and counter-claim. If such copy was not served, and appellant desired to save the error, it should have been presented by affidavit as an irregularity, and in the absence of such affidavit it will be presumed, from the finding of the court, that a copy was duly served, which gave the court jurisdiction of the subject-matter of the counter-claim. The court finds defendant, John Kinna, entitled to a lien for $1,139, and that notice of lien was filed November 30, 1869. The court also finds that Samuel Davenport is entitled to a lien for $480, and that he filed notice of lien November 17, 1869; that E. L. Curry is entitled to a lien for $888, and that notice was filed November 17, 1869, at 2 o'clock P. M.; that R. S. Hale is entitled to a lien for $470.35, and filed notice November 15, 1869; that Benjamin Daily filed notice of lien for $571.63, on January 12, 1870, and is entitled to a lien for $590, which must include interest allowed for vexatious withholding; that D. B. McKillican is entitled to a lien for $526, and filed notice of lien December 8, 1869, at 5 o'clock P. M.

Upon the appeal of defendant Davis, the only question presented relates to the priority of the mortgage of the property in question executed to him by defendant Germaine, over the several liens established. Upon this point a majority of this court are of opinion that the statute expressly gives preference to liens of mechanics and material-men, over any incumbrances made subsequent to the commencement of the building, and that the court having found the fact that the building in question was commenced before the execution of said mortgage, all the liens found were properly preferred to it.

This cause is therefore remanded to the court below, and the judgments entered in favor of the plaintiffs and the several defendants herein, for the respective amounts found due to them, are affirmed, and the costs of filing the several

complaints as answers in this cause, and serving copies of the same, and such costs as were necessarily incurred by them in defense and assertion of their several rights in this proceeding, shall be ascertained and taxed by the court; and it is ordered and adjudged that the appellants, Germaine and Davis, respectively, recover from the several defendants herein, the costs and charges incurred by them in answering and defending the several separate proceedings herein specified, to be taxed by the court. It is further ordered that special *fieri facias* executions issue in favor of said several parties, for the said amounts for which said judgments were rendered and their costs, by the court, if such executions have not heretofore issued, and that, if no sufficient property of defendant Germaine has been or can be found to satisfy the said several judgments and costs taxed, then the residue of such judgments, or any of them, be levied out of said property described in the complaint, and that said property, or so much thereof as may be necessary, be sold in accordance with law to satisfy the same; and that out of the proceeds of such sale there be paid the costs of suit and of sale, and thereafter the said judgments be paid and satisfied to the extent of such proceeds, in the order of filing the said several accounts and notices of lien in the recorder's office, as found by the court, and that said several liens so found by the court be decreed to be prior and paramount to the mortgage executed by appellant Germaine, to appellant Davis, mentioned and set out in the answer of said Davis, and that the surplus, if any, be brought into court to await its further order.

WARREN, C. J., dissenting. I respectfully dissent from so much of the foregoing opinion as relates to the question of priority of Davis' mortgage over the several liens established. The contracts under which the different claimants performed labor or furnished material were entirely separate and distinct, one from the other, and in my opinion the priority of each must be determined by the date at which he himself commenced to fulfill his contract, and not by the com-

mencement of some other work, under another contract by another person on the same building. The statute contemplates the completion of the building or erection under one contract, and in that event gives preference over any incumbrance made subsequent to the commencement of the building or erection, but does not relate to several contracts, each of which is made with reference to incumbrances as they exist at the time of commencing to fulfill them respectively.

Judgment affirmed in part and reversed in part.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1871, HELD IN VIRGINIA CITY.

Present:

HON. HENRY L. WARREN, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. GEORGE G. SYMES, }

MURPHY, respondent, *v.* AMES et al., appellants.

PRACTICE—*probate judge cannot issue summons—jurisdiction.* A judge of the probate court has no power to issue and attest a summons under his own hand, if there is no law providing for a clerk or seal of the court, and no jurisdiction is acquired by such a summons.

PRACTICE—*special appearance—jurisdiction.* The special appearance of a party for the purpose of moving to dismiss the action confers no jurisdiction upon the court.

Appeal from the Third District, Lewis and Clarke County.

MURPHY commenced this action against T. P. and J. A. Ames, in the probate court of Lewis and Clarke county, in April, 1868, to recover $231. A summons was issued under

the hand and seal of M. F. Truett, probate judge. The defendants then appeared, specially, for the purpose of making a motion to dismiss the action and quash the summons, because there was no legal summons issued under the seal of the court, and signed by the clerk thereof. The motion was overruled by the court, and the defendants' attorneys withdrew. Judgment was rendered in favor of plaintiff, and defendants appealed to the district court.

In April, 1870, in the district court, SYMES, J., the judgment of the probate court was affirmed, and defendants appealed.

CHUMASERO & CHADWICK, for appellants.

The probate courts are courts of record. There can be no court without a special enactment of the legislature. A court should have a judge and a prothonotary. Bouv. L. D., "Court."

The practice of the probate court is regulated by that of the district court. Acts 1867, 259, § 7. Suits must be commenced in the probate court by filing the complaint with the clerk of the court, and the issuing of a summons thereon. The clerk must indorse the complaint and sign the summons. Civil Prac. Act, §§ 22, 23. These sections must be strictly construed. The summons was not signed by "the clerk of the court," and the action should have been dismissed.

The mode of commencing suits and acquiring jurisdiction of parties is regulated by the civil practice act and not by common law. The act must be strictly followed. *Dupuy* v. *Shear*, 29 Cal. 238.

WOOLFOLK & TOOLE, for respondent.

The organic act does not make probate courts courts of record, or require the appointment of a clerk in such courts. Organic Act, § 9; Amended Organic Act, § 2.

There is no law making probate courts courts of record. They are courts of inferior jurisdiction. Acts 1865, 390, § 1. Probate judges are allowed fees for issuing a summons and

performing duties that appellants claim they could not perform. Acts 1865, 473, 474. Clerks of the district court receive fees for similar services. Acts 1865, 470; Acts 1867, 248, §§ 1, 7.

If probate courts were courts of record under the laws of Montana, they are not common-law courts of record. Common-law courts may be modified by statute. The legislature contemplated that the judges of probate courts should discharge the duties of clerk.

There was no such office as clerk of the probate court until December 30, 1868. Acts 1869, p. 70. There could be no legal appointment until this office had been created. The organic act and the statutes had conferred powers upon the probate courts. This grant of powers carries with it every thing necessary to its complete exercise. The right of a probate judge to issue a summons would be implied as incident to its powers, even if there were no law giving him this right. Acts 1865, 139, § 482, *Nougues* v. *Douglass*, 7 Cal. 80; *Kennedy* v. *Hamer*, 19 id. 374.

Section 22 of the practice act was borrowed from California and doubtless left in the act through mistake. It does not prevent a probate judge from acting as his own clerk.

WARREN, C. J. The only question presented in this record is, whether the probate court acquired jurisdiction in the cause by the service upon defendants of a summons issued under the hand of the judge of that court. This was before the passage of the act of the legislative assembly making provision for clerks of the probate courts. The civil practice act, however, then in force, prescribed the manner of commencing actions in the probate courts, and required the summons to be issued under the hand of the clerk, and the seal of the court. The fact that the statute had made no provision for either clerk or seal for such courts did not confer upon the judge the power to issue and attest a summons under his own hand. Voluntary appearance would be sufficient to confer jurisdiction, but the defendants in this case having confined their appearance to

the sole purpose of moving for a dismissal, and not being properly in court, the proceedings and judgment were *coram non judice* and must be set aside.

The judgment is reversed and cause remanded.

Judgment reversed.

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*MASON et al., respondents, *v.* GERMAINE et al., appellants.

PRACTICE — *appeal bond to supreme court of United States.* The bond on appeal from this court to the supreme court of the United States is the same as that required by the laws of congress and the rules of the supreme court of the United States on appeals from the circuit court to the said supreme court.

PRACTICE — *conditions of bonds on appeal to stay execution of judgment.* The execution of a judgment for the sale of property to satisfy mechanics' liens is not stayed on appeal to the supreme court of the United States, unless the bond on such appeal is conditioned according to law, and executed to the respondents, and sufficient in amount to secure the liens decreed, the costs of suit, the damages for the delay and detention of the property and the costs and interest on the appeal.

THE facts appear in the opinion of the court.

SHOBER & LOWRY, W. F. SANDERS and CHUMASERO & CHADWICK for motion for a remittitur.

The bond required by the last clause of the judiciary act must be sufficient to secure the whole judgment in case it should be affirmed, if the writ of error operates as a supersedeas. 1 U. S. Stats. at Large, 84, 404; *Catlett* v. *Brodie*, 9 Wheat. 553; *Stafford* v. *Union Bank of Louisiana*, 16 How. 135.

No bond has been given in this case to secure any part of the judgment, if it is affirmed. The writ of error does not operate as a supersedeas; and the remittitur follows as a matter of law.

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*The original case is reported on page 263.

This is the proper court to apply to for the purpose of having the decree carried into effect. *Stafford* v. *Union Bank of Louisiana*, 17 How. 275.

E. W. & J. K. TOOLE, against the motion.

This motion should have been made in the supreme court of the United States. The court from which the appeal is taken cannot act in the first instance. The motions for a remittitur, in all the cases cited, were made in the supreme court of the United States.

The question of the sufficiency of an undertaking to operate as a supersedeas, where the citation, bond, etc., are given within the time, and allowed by the proper authority, must be determined by the court to which the appeal is taken.

Appellants have a right to amend their undertaking if defective. *Catlett* v. *Brodie*, 9 Wheat. 553. By granting a remittitur, this court would deprive appellants of a right to amend their bond, and they would have no redress.

SYMES, J. This case came up on appeal, and the judgment below was affirmed at the August term of this court, and an appeal was taken to the supreme court of the United States. A motion is now made for a remittitur to the court below, to execute the judgment, on the ground that the bond, on appeal from this court, is not sufficient to stay the execution of the judgment. The case is one brought under the mechanics' lien law, to enforce liens to the amount of about $20,000, for the construction of a large brick hotel, and the bond given to supersede the execution of the judgment, during the pendency of the appeal, in the sum of $25,000, in addition to a bond for costs, is conditioned only that the obligors will answer all damages to the hotel building caused by waste or fire, during the possession of the same by appellants, not exceeding said sum.

Respondents, for the motion, contend that the bond should be for the payment of the whole amount of the

judgment in case of affirmance. Appellants, against the motion, contend that it is an appeal only from that portion of the judgment decreeing the enforcement of the liens, and ordering sale of the property therefor, and only required such a bond.

The supreme court of the United States have held that, to supersede a judgment on writ of error or appeal, the bond must be sufficient to secure the whole amount of the judgment, damages for delay, and costs. *Catlett* v. *Brodie*, 9 Wheat. 552; *Stafford et al.* v. *Bank of Louisiana*, 16 How. 139.

In the latter case, holding that, although it was an appeal in equity, and the property was in the hands of a receiver, the bond should be the same, sufficient to secure the judgment. But the supreme court, at the December term, 1867, adopted a rule providing the bonds that should be given on writs of error and appeals. See 32d Sup. Ct. Rule.

The rule provides that in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, indemnity in such cases shall only be required in an amount sufficient to cover amount recovered for use of the property, costs of suit and damages for delay, and costs and interest on the appeal; and conditioned that the appellant will prosecute his writ of error or appeal to effect, and answer damages if he fail to make his plea good.

The appeal in this case to this court, and after affirmance from this court, was from the whole judgment of the court; but the bond given in the court below, and since in this court, was not intended to stay the personal judgment against defendants, but only that portion of the judgment decreeing the sale of the property to satisfy the liens. The bond on appeal to this court was given in accordance with section 336, Civil Code, which provides the bond to be given in such cases.

But the bond on appeal from this to the supreme court of the United States must be in accordance with the law and practice provided by congress and the rules of the

supreme court of the United States on appeals from the circuit courts of the United States to the supreme court thereof.

Is the bond filed in this case in accordance with the said rule of the supreme court, adopted in accordance with the laws of congress?

The bond is filed to supersede or stay the execution of a decree for the sale of real property, which property necessarily follows the event of the suit. The bond should then provide for an amount to secure the liens recovered, if any, for detention of the property, the costs of suit, just damages for delay, and costs and interest on appeal, and be executed to the respondents or appellees, and conditioned as required by said rule.

The bond in this case is not executed to respondents; does not provide for damages for delay, or detention of the property, nor for costs and interest on appeal, and is not conditioned as prescribed by law, and it is insufficient to stay the execution of the judgment.

The court orders that a remittitur issue from this court to the court below to execute the judgment, unless the appellants within twenty days file a legal bond in accordance with the law as stated in this decision.

Remittitur granted.

KING et al., respondents, *v.* SULLIVAN, appellant.

PRACTICE — *consideration of statement — exceptions.* This court will not consider a statement that has not been duly settled and certified, or exceptions that have not been duly presented and signed according to the statute.

PRACTICE — *review of exceptions to admission of evidence.* An exception to the admission of evidence upon a cross-examination will not be examined if all the evidence is not before the court.

Appeal from the Third District, Lewis and Clarke County.

THE arguments of counsel and statement of facts are not reported, because the court did not review them. The cause was tried in the district court before SYMES, J.

WOOLFOLK & TOOLE, for appellant.

CHUMASERO & CHADWICK, for respondents.

WARREN, C. J. In this case the appeal is from an order overruling defendant's motion for a new trial, and from the judgment entered on the verdict of the jury for plaintiffs. The transcript contains what purports to be the evidence in the case, and also instructions given and refused, and exceptions taken at the trial below. At the conclusion of appellant's motion for a new trial, which sets forth the grounds of the motion, appears the words, "statement settled as correct," but there is no certificate of settlement of any statement signed by the attorneys of the parties or by the judge below, nor does it appear what statement is referred to by these words. This court can consider nothing which is not part of the judgment-roll, unless it be presented by exceptions duly preserved and signed, or by statement settled and certified as required by the statute. An exception to the admission of some evidence, upon cross-examination of the defendant, is properly preserved by the signature of the judge, but, as the whole evidence is not before us, we cannot presume the ruling to be erroneous or that the appellant was prejudiced by it.

The judgment-roll does not show the errors assigned, and the judgment must be affirmed.

Judgment affirmed.

NELSON, appellant, *v.* O'NEAL, respondent.

INJUNCTION—*miners' dam to stop tailings.* It is not an abuse of discretion for a court to refuse to enjoin parties from building a dam upon their mining ground, to prevent tailings from injuring their property.

RIGHT OF MINERS TO CHANNEL OF CREEK FOR WATER AND TAILINGS. Miners are entitled to the free use of the channel of a creek, so that the water will flow from their ground, but they have no right to fill the channel with tailings that will flow down upon the claims of other miners.

Appeal from the Third District, Lewis and Clarke County.

THE facts are stated in the opinion of the court.

The judgment appealed from was rendered in the district court, in August, 1870, by SYMES, J.

SHOBER & LOWRY, E. W. TOOLE and G. MAY, for appellant.

It is admitted by the pleadings that respondents were insolvent. The jury found that the erection of the dam higher, as complained of by appellant and threatened by respondents, would interfere with the profitable use and enjoyment of appellant's mining ground. Appellant was entitled to an injunction to restrain respondents from erecting said dam. *Ramsay* v. *Chandler*, 3 Cal. 90.

An injunction is a preventive remedy, and it comports more with justice to both parties to restrain the threatened trespass, than to leave the appellant to his remedy at law, particularly when the respondents admit their insolvency and have no remedy at law. *Slade* v. *Sullivan*, 17 Cal. 102; Hill. on Inj., ch. 1, §§ 1, 5, 7, 14, 31.

Appellant's mining operations will be interfered with, if respondents are not enjoined. Respondents have shown no right to trespass on appellant's ground.

W. F. SANDERS, for respondents.

Respondents own the ground on which the dam was erected and debris arrested. Respondents threatened to

raise their dam higher to stop a trespass of appellant. They could compel appellant to stop this trespass on his own ground. The pleadings and findings do not show who has priority of right in mining. Appellant cannot have judgment, until the questions relating to the right of respondents to flow back on appellant's ground, debris, tailings, etc., which appellant is wrongfully attempting to flow on respondents, are settled in favor of appellant. *Logan* v. *Driscoll*, 19 Cal. 623; Am. Law Reg. 1867, 1868, p. 698.

Parties must care for their own tailings on their own ground. Respondents could crib those of appellant on his own ground, but the jury find that respondents cribbed them on their own. A mere threat to commit a trespass, without an overt act, does not justify an injunction.

KNOWLES, J. This is an action of trespass, brought by appellant for damages for an alleged entry upon his mining ground, and erecting a dam thereon, which stopped tailings upon the said mining ground, and alleging that the respondents threatened to continue the injury, and to erect the said dam higher, and asking for an injunction to restrain them from the commission of these wrongs. Respondents deny that appellant owns the mining ground described; admit erecting the dam and the intention to erect it higher, and aver that the dam is on their own ground, and that the same was erected to prevent appellant from running their tailings down upon their ground.

The jury, in their special findings, determine that appellant does not own the mining ground upon which the dam was erected; that respondents had not interfered with the mining rights of appellant by the erection of the dam in question. They also find that the erection of the dam higher will interfere with the profitable mining operations of appellant. Upon this last finding, appellant asked an injunction of the court below, which was refused. This is assigned as error.

It appears, from the complaint of appellant, that the tailings which the dam of respondents prevented from flowing

down, were tailings from appellant's mining ground. The granting or refusing an injunction was discretionary with the court below. We do not think it was an abuse of discretion in refusing an injunction to restrain the respondents from building a dam on their own ground, so as to prevent appellant from committing an injury upon the same. Appellant would be entitled to the free use of the channel of the creek, to allow the water which came down from above to flow away from his mining ground, but he had no right to fill the channel of the creek with tailings and debris, and let it flow down upon respondent's ground.

Order of the court below affirmed, with costs.

Judgment affirmed.

TOOMBS, respondent. *v.* HORNBUCKLE et al., appellants.

PLEADING—*insufficient denial.* The denial of an "unlawful and wrongful" diversion admits the fact of the diversion.

PRACTICE—*verdict against evidence.* A verdict will not be set aside, as contrary to evidence, unless it is clearly unsupported by evidence.

Appeal from the Third District, Lewis and Clarke County.

THE facts are contained in the opinion. The action was tried in April, 1870, in the district court, before SYMES, J.

CHUMASERO & CHADWICK, for appellants.

The decree of the court below was not justified by the evidence or special findings of the jury. The testimony shows that the water flowing from the springs was diminished in quantity almost one-third, and lacked only ten inches of furnishing respondent with all the water he was entitled to by the findings of the jury. The use of this water by miners materially diminished its quantity below the springs. The findings are in accord with the facts, and

the rights of the parties should be determined by them. These findings show that appellants had not diverted from respondent's ditch any water to which respondent was entitled, and that there flowed at all times from the springs, the water that respondent was entitled to, if the miners did not obstruct it. When the miners obstructed the water from the springs, sixty inches reached the respondent's ditch. The miners so obstructed this water during June and July, 1869.

The decree makes appellants liable for the acts of those miners, and compels them to supply respondent with water to which respondent has no claim. Appellants are obliged to leave in the creek, at the head of respondent's ditch, seventy inches of water, regardless of any depredations that may be committed by strangers below their point of appropriation. This decree overrides every principle of equity. No man should be made responsible for the acts of another, committed without his knowledge or assent. The injunction wrests from the appellant his property, to compensate an injury that he did not cause. That part of the decree, which interferes with the user by appellants of all the waters at the head of their ditch, in Magpie creek, should be set aside, and the injunction should be dissolved.

E. W. & J. K. TOOLE, for respondent.

Respondent was first in right as to seventy inches of water. The decree gives him this amount at the head of his ditch. Respondent cannot suffer from natural causes affecting the supply of water. The finding, respecting the springs, is immaterial. The general verdict is conclusive as to the estoppel claimed by appellants.

WARREN, C. J. The plaintiff, in this case, alleges right of possession and user of about two hundred and fifty inches of the waters of Magpie creek, by virtue of his appropriation thereof, made in 1865, by means of a ditch there constructed, for the purpose of irrigation, and alleges a continuous wrongful diversion of such water by defendants, prior to the

commencement of this action, and threats by defendants to continue such diversion. He prays judgment for damages; that title be established and decreed in him to the extent of his prior appropriation, and that defendants and those in privity with them, be perpetually enjoined from diverting such waters.

The answer in substance denies plaintiff's appropriation, and also denies that defendants "wrongfully or unlawfully" diverted said water, and sets up an appropriation of the waters of Magpie creek, made by defendants for mining purposes, in May, 1866, and subsequently, in October, 1866, by means of ditches then constructed, and that said waters were then unappropriated, and that defendants thereafter remained in full and peaceable possession thereof; and, further, plead by way of estoppel, that plaintiff had actual knowledge of defendant's intention to so appropriate said water, prior to and during the construction of their ditches, and failed to assert his title to said water, or to forbid their construction of the ditches.

The replication specifically denies each allegation of the answer.

The denial of "unlawful and wrongful" diversion, as has been often held, admits the fact of diversion, so that the only issues on the pleadings are upon the priority of the respective appropriations, and upon the facts constituting the estoppel pleaded.

The issues were tried by jury, which found a general verdict for the plaintiff, and a special verdict upon questions of fact submitted to them. The court below overruled defendant's motion for a new trial, and rendered judgment for the damages found by the jury, and entered a decree perpetually enjoining the defendants and their privies from so diverting the waters of the creek, as to prevent seventy inches of water, being the quantity found by the jury to have been first appropriated by plaintiff, from flowing down to plaintiff's ditch.

From the order overruling his motion for a new trial, and from the judgment and decree, the defendant appeals, and

assigns as error that the evidence and special findings of the jury do not support the decree, and are in conflict with the general verdict.

The evidence is in some respects conflicting, but whatever our views might be, in any case, we do not feel justified by any precedents in setting aside a verdict as contrary to evidence, unless clearly unsupported by evidence, which is not the case here, so that the only question left to consider is, whether the special verdict conflicts with the general verdict, and fails to support the decree.

The general verdict finds the issues joined, as to priority of appropriation, and as to the facts set up as an estoppel for the plaintiff. These were the only issues raised by the pleadings.

The first special finding of the jury fixes the amount of plaintiff's appropriation at seventy inches of water, and of this finding appellants do not complain. The second finding is, that sixty inches of water flowed down to plaintiff's ditch during June and July, 1869, when the diversion by defendants is alleged. The third finding is, that seventy inches of water "flow down Magpie gulch" from "the springs," when all the water is taken out above the springs during wet or dry season, and it is not obstructed by miners. The "springs," mentioned in the last finding, appear from the evidence to be situated between the respective ditches of plaintiff and defendants, the latter being some distance above the former, and appellants claim that under the third finding of the jury, the defendants did not, and as a physical fact could not, divert any water, to which plaintiff was found by the jury to be entitled.

Had the question of diversion been properly put in issue, and if the jury had definitely found that, at the time of the alleged diversion, the "springs," below defendant's ditch, alone furnished sufficient water to supply the amount found to have been appropriated by plaintiff at the head of his ditch; this would be undoubtedly true, but the last finding is too uncertain and indefinite to overturn the other special findings and the general verdict, and is, besides, immaterial,

being upon a fact not in issue. The point urged by appellant, that the decree makes him answerable for the acts of third parties with whom he has no privity, in diverting water below the springs, is not well taken, as the decree rendered only requires the defendants to permit so much of the waters in question to pass their ditch, as that seventy inches may in its natural flow reach the head of plaintiff's ditch, in the bed of the stream at that point, whether from the springs or above them, and this is all that is enjoined on them. They are not held responsible for any acts of others.

The judgment and decree are affirmed.

Judgment affirmed.

LOMME, respondent, *v.* KINTZING et al., appellants.

PRACTICE — *sham answer — judgment on pleadings.* If the answer does not raise a material issue it may be struck out as sham, or judgment may be rendered on the pleadings.

PARTNERSHIP — *agreement about profits and payment of debts — creditor.* A special agreement between two parties by which one of them is to receive one-third of the profits of a business for his services, and the other is to be liable for the debts, is no defense to an action commenced against them as partners by a creditor, who had no notice or knowledge of the agreement before the liability accrued.

PARTNERSHIP — *effect of plea of bankruptcy by one partner.* In a suit against a firm in which one partner files a plea of bankruptcy, the court properly directed a stay of proceedings as to him, and rendered a judgment for the amount claimed by plaintiff, to be enforced against the partnership property and the individual property of the other partner.

Appeal from the Third District, Lewis and Clarke County.

THE facts are stated in the opinion. The complaint alleged "that, on the 1st day of July, A. D. 1869, the said defendants were copartners, doing business at the town of Helena, county and Territory aforesaid, under the firm name of B. C. Kintzing & Co.; that, on the day and year aforesaid, the said defendants, copartners as aforesaid, were indebted

unto this plaintiff in the sum of $4,384.89, balance due for money lent and advanced by plaintiff to the defendants, and for money had and received by the said defendants for the use and benefit of this plaintiff, for goods and wares and merchandise sold and delivered by plaintiff to the said defendants, and for work, labor and services done and performed by the said plaintiff for said defendants — all at the special instance and request of the said defendants — which said sum of $4,384.89 the said defendants, on the day and year aforesaid, promised to pay the said plaintiff when thereto requested by the said plaintiff; that the said plaintiff has demanded payment of the said sum of the defendants; that the defendants, or either of them, have not paid the said sum, or any portion thereof, and the same remains wholly due and unpaid, wherefore the said plaintiff prays judgment," etc.

To this complaint the appellant B. C. Kintzing filed his third amended answer, and "denies that on the 1st day of July, A. D. 1869, or at any other time, the defendants were partners in the town of Helena, and Territory of Montana, under the firm name and style of B. C. Kintzing & Co. Denies that on the day and year aforesaid, or at any other time, the said defendants, as such copartners, were indebted to the plaintiff in the sum of $4,384.89, or any other sum, for money lent and advanced by plaintiff to defendants; for money had and received by defendants for the use and benefit of plaintiff; for goods, wares and merchandise sold and delivered by plaintiff to defendants, and for work, labor and services done and performed by plaintiff for said defendants, at their special instance and request, as charged in plaintiff's complaint.

Denies that this defendant ever promised to pay plaintiff the said sum of $4,384.89, or any other sum; denies that plaintiff ever demanded payment of said amount of money from this defendant; denies that this amount, or any other sum, remains due and unpaid to plaintiff.

Defendant, for further answer to the complaint of the plaintiff, admits that for a short time, in the spring of 1869,

the above defendants were associated in business in the town of Helena, and Territory of Montana, under the name and style of B. C. Kintzing & Co., but avers that this defendant had no interest whatever in the capital stock of said business, but only received for services rendered equal to one-third of the profits of the business of said B. C. Kintzing & Co.; that Charles S. Kintzing owned the entire capital stock in said business, and was solely liable for the debt incurred in said business by B. C. Kintzing & Co., under his agreement with this defendant; and that plaintiff had full knowledge of the extent of this defendant's interest and liability as aforesaid while in the employment of B. C. Kintzing & Co.

This defendant, for further answer to plaintiff's complaint, states that Charles S. Kintzing, his co-defendant as aforesaid, has, since the institution of this suit, been adjudged a bankrupt under and by virtue of the provisions of an act entitled "An act to establish a uniform system of bankruptcy throughout the United States." The proceedings, under said act, having been had in the city of St. Louis and State of Missouri, wherefore this defendant denies the right of plaintiff to prosecute this action, and asks to be discharged with his costs in this behalf expended."

Judgment was rendered for plaintiff in October, 1870, by the district court, SYMES, J.

E. W. & J. K. TOOLE, for appellants.

The proceedings against appellants should have been suspended by the court after the plea in bankruptcy had been interposed. This plea, for the purposes of this appeal, must be taken as fully established. The local courts must yield to the superior authority of the courts of bankruptcy. The execution in one case and warrants in the other would require the respective officers, acting under them, to take the same property. Property thus taken belongs to the jurisdiction of one of these courts. The territorial courts cannot adjudicate the rights of parties under the bankrupt act. They must be determined in a court of bankruptcy.

The court erred in rendering judgment on the pleadings. The complaint proceeds upon a general assumpsit, express or implied, on the part of appellants, to pay respondent a certain sum. An express or implied promise may be shown under this complaint. *Higgins* v. *Germaine*, *ante*, 228. The gist of this action is the express or implied promise of appellants to pay respondent. Appellants specifically deny any such promise. See answer. When there is a promise to pay a sum on account of certain items, a denial of such promise, or the indebtedness, is good.

The partnership is denied as to the respondent. The answer states facts, showing that appellants were not liable as partners to respondent.

The defective denials, if any, are cured by affirmative allegations. *Nudd* v. *Thompson*, 34 Cal. 39; 3 Estee's Pl. 381; *Newell* v. *Doty*, 33 N. Y. 83. The answer denies that any thing is due respondent. To render a judgment on the pleadings, such judgment must not be inconsistent with any material matter denied or affirmatively pleaded. The defective denials, if any, were caused by the bad pleading of respondent, for which he should be held responsible.

The practice act of Montana contains no provision for judgment on the pleadings. Section 50 provides that sham answers may be stricken out on motion. The New York Code provides expressly for judgment on the complaint, and answer on five days' notice. Howard's N. Y. Code, 388.

No judgment can be rendered on the pleadings if one material fact is denied, or the answer sets up new matter. The whole answer must be "sham and irrelevant." *Ghirardelli* v. *McDermott*, 22 Cal. 539; *Gay* v. *Winter*, 34 id. 161; *Willson* v. *McDonald*, cited in 3 Estee's Pl. 381, § 4.

Under the New York Code judgment cannot be rendered on the pleadings, unless the whole answer is frivolous and insufficient. *Nichols* v. *Jones*, 6 How. Pr. 355; *Van Valen* v. *Lapham*, 13 id. 240; *Kelly* v. *Barnett*, 16 id. 135; *People* v. *McCumber*, 18 N. Y. 315.

Appellants denied all the material allegations of the complaint, and set up new matter. Yet the court, without

notice, rendered judgment on the pleadings, on the ground that one single denial was technically defective.

CHUMASERO & CHADWICK, and W. F. SANDERS, for respondent.

In effect, this case stands on a demurrer by respondent to the answer of appellant B. C. Kintzing, because it did not state facts to constitute a defense, and did not deny the allegations of the complaint so as to constitute a defense.

The denial of copartnership is the denial of an immaterial allegation. *Whitwell* v. *Thomas*, 9 Cal. 499. But the denial is faulty. It makes the firm name and place of partnership material, both of which are immaterial.

The allegations of the complaint are interpreted to be, that appellants did have and borrow moneys, and did perform labor at their request. The second denial is not of any fact, but the conclusion, the indebtedness. The conjunctive conjunction is also used by appellants in denying that they owe for the three several items. The promise to pay, upon the facts confessed, is implied by law. A denial of the promise is not a defense. The affirmative allegations, with no denials of the allegations of the complaint, are insufficient.

The bankruptcy of C. S. Kintzing did not abate the action, nor destroy B. C. Kintzing's liability or that of the firm.

The following authorities are to the effect that the denials of the answer do not raise an issue: Sto. on Eq. Pl. 852; Stephen on Pl. 243-5, 379; *Hopkins* v. *Everett*, 6 How. Pr. 159; *Salinger* v. *Lusk*, 7 id. 430; *Davison* v. *Rowell*, 16 id. 467; *Fish* v. *Redington*, 31 Cal. 194, and cases cited.

An adjudication of bankruptcy is the judgment of a court, and must be pleaded with the precision required for pleading judgments. No court is named in the answer. If the bankruptcy were well pleaded, this action could proceed against the other appellant, as surviving partner, and judgment could be rendered against the property of the firm. Our statute recognizes the same principle, in allowing judgment against property where all the joint owners are not served. Civ. Prac. Act, § 32.

WARREN, C. J. The court below, in this case, on motion of the plaintiff, rendered judgment on the pleadings, from which the defendants appeal. Under our practice, where an answer raises no material issue, the plaintiff may either move that it be stricken out as sham and irrelevant, or move for judgment. This is an action upon an account against the defendants, as copartners, under the firm name of B. C. Kintzing & Co., in the town of Helena and Territory of Montana. The separate amended answer of B. C. Kintzing denies the partnership under the style and at the time and place alleged; denies indebtedness of defendants as such partners; denies any promise by himself to pay; denies any amount to be due plaintiff, and pleads as new matter that the defendants were, for a short time, in the spring of 1869, associated in business in the town of Helena and Territory of Montana, under the style of B. C. Kintzing & Co., but that C. S. Kintzing furnished all the capital stock for such business, and by special agreement was to be individually liable for all debts incurred therein, and B. C. Kintzing was to receive one-third of the profits thereof in compensation for his services, and avers that plaintiff had actual knowledge of this agreement, while in the employment of B. C. Kintzing & Co., and further pleads an adjudication of bankruptcy of C. S. Kintzing since commencement of this action.

These denials raise no issue as to the fact of partnership, or the alleged liability of the defendants as partners. The new matter is insufficient, as it states facts which legally constitute a partnership, and in order that the special agreement between defendants as to individual liability should affect the plaintiff, it was necessary to aver that plaintiff had notice or actual knowledge of such agreement, before the liability alleged in the complaint accrued. The allegation that plaintiff had such knowledge "while in the employment of B. C. Kintzing & Co.," is too vague, and being taken most strongly against the pleader, is insufficient.

Under the plea of bankruptcy of C. S. Kintzing, the court directed a stay of proceedings as to him, and rendered a

judgment in favor of plaintiff for the amount claimed, to be enforced against the partnership property of B. C. Kintzing & Co., and the individual property of B. C. Kintzing. If this is error, it is not such as either appellant can complain of.

Judgment affirmed.

COLUMBIA MINING COMPANY, appellant, *v.* HOLTER et al., respondents.

WATER RIGHTS—*change of point of diversion.* If H. appropriated the water of a creek at a certain point in 1865, and C. appropriated the same water above H., in 1867, for the use of a mill, and returned the water into the creek, so that H. had the benefit thereof, H. has no right to change his point of diversion of the water in 1869, and appropriate it above C.'s mill, and thereby deprive C. of the use of the water.

WATER RIGHTS—*claim to water—appropriation—possession.* A party who intends to claim water must appropriate the same with reasonable diligence by some known means, and at a certain point; a declaration of such a claim, without any acts of possession, is insufficient.

Appeal from the Third District, Lewis and Clarke County.

THE facts are stated in the opinion. The judgment was rendered in the district court, at the July term, 1870, by SYMES, J.

W. F. SANDERS and CHUMASERO & CHADWICK, for appellants.

The answer does not deny the allegation of the complaint, that appellant and its grantors, from March 28, 1865, to the commencement of this action, had enjoyed the water specified. Appellant would be protected in its use for four years by the statute of limitations. Acts 1865, 466; *Union W. Co.* v. *Crary*, 25 Cal. 504; *American Co.* v. *Bradford*, 27 id. 360; *Lick* v. *Diaz*, 30 id. 65.

This was an equity case. *Gale* v. *Tuolumne W. Co.*, 14

Cal. 25; *Parke* v. *Kilham*, 8 id. 77. The court properly sought to find four facts from the jury, the date of each appropriation and the place. Respondents could not change their point of appropriation after October, 1865, to the injury of intervening locators. *Butte C. & D. Co.* v. *Vaughn*, 11 Cal. 143; *Kidd* v. *Laird*, 15 id. 161; *Nevada W. Co.* v. *Powell*, 34 id. 109; *Davis* v. *Gale*, 32 id. 26. Respondents, in May, 1869, went two miles above their location, in September, 1865, and attempted to change the point of appropriation to the injury of appellant.

The general verdict, being inconsistent with the special findings and admitted facts, should have been set aside. Civ. Prac. Act, § 175.

A subsequent appropriator, higher up the stream, who diverts the water and returns it to the first but lower appropriator, is not liable to an action by the first appropriator. *Union W. Co.* v. *Crary*, 25 Cal. 504.

Water collected in pipes and separated from the original source of supply is personal property. *Heyneman* v. *Blake*, 19 Cal. 579.

The refusal of the jury to allow damages does not affect the right of appellants to the abatement of a nuisance or the costs. Sto. on Eq. Jur., §§ 921–926; *Hudson* v. *Doyle*, 6 Cal. 101; *Courtwright* v. *B. R. & A. W. & M. Co.*, 30 id. 576.

A judgment will be set aside without a motion for a new trial, if it cannot stand from the proof or conceded facts. A motion to modify the findings enables the court to look into the evidence for facts. *Sanford* v. *Eighth Ave. R. R. Co.*, 23 N. Y. 343; *Purchase* v. *Mattison*, 15 Abb. Pr. 402; 3 Estee's Pl. 728, §§ 237–239.

E. W. & J. K. TOOLE, for respondents.

The statement cannot be considered in connection with the instructions. No exception is made a part of the judgment roll. Civ. Prac. Act, § 203; *Newell* v. *Doty*, 33 N. Y. 83. No exception, except a general one, is assigned in the statement. *Jones* v. *Osgood*, 6 N. Y. 233; *Caldwell* v. *Murphy*, 11 id. 416; *Duncke* v. *Wiles*, id. 420; *Lansing* v. *Wiswall*, 5 Denio, 213; 3 Estee's Pl. 688, § 146

Appellant's use of the water was inconsistent with respondents' right, and under protest. The statement does not bring up all the evidence, and the verdict of the jury must be supported. The court cannot consider the question of the sufficiency of the evidence to justify the verdict. 3 Estee's Pl 727, § 236; *Gifford* v. *Carvill*, 29 Cal. 589; *Bernal* v. *Gleim*, 33 id. 669.

A denial of appellant's title to the water, or any of its rights and equities, puts appellant on proof. *Marshall* v. *Shafter*, 32 Cal. 176.

No estoppel or statute of limitations is pleaded. No damage is found. This is necessary to entitle appellant to a perpetual injunction. To this extent, the general verdict is conclusive, as it is only set aside to the extent of conflict with the special findings.

WARREN, C. J. This is an action for damages, for diversion of the waters of the west branch of Oro Fino creek, by defendants, and praying a perpetual injunction against them. The answer does not sufficiently deny, under the well-established rules of pleading, any material allegation of the complaint, but sets up a prior appropriation, by grantors of defendants, under which they justify the diversion.

The cause was tried before a jury, who found a general verdict for defendants, and also a special verdict. Appellant moved the court to set aside the general verdict, and for a judgment and decree of injunction upon the special verdict, which was overruled, and a judgment rendered for defendants, and a dissolution of the restraining order in force. Appellant appeals from the judgment, and among other errors assigns this action of the court, and embodies the evidence in his statement. On appeal from a judgment, this court will look into the evidence for an explanation of errors assigned, and we are of opinion that the evidence preserved in this case, in connection with the pleadings and the special findings of the jury, disclose error in entering the judgment under the general verdict.

The jury find, specially, that defendants' grantors appro-

priated the water in question, in October, 1865, and that the point at which they diverted it from its channel was one mile and a quarter below Unionville. They also find that the grantors of plaintiff appropriated said waters in September, 1867, and that they took possession of same at a point about one hundred yards above the mill of the Columbia Mining Company. The evidence, explanatory of this finding, shows the facts to be that defendants derive title through one Laird, who, in October, 1865, posted a written notice on the creek, claiming all the waters of the creek and its tributaries, for mining and other purposes, and thereafter with due diligence erected a dam and reservoir at the point where his notice was posted, and constructed ditches and flumes from said point to convey the water for the purposes indicated. That plaintiff's grantors erected their mill and appropriated said waters for its operation in September, 1867, at a point on said creek, one mile and a quarter above the point where Laird's notice was posted, and his reservoir and ditches constructed, and continued thereafter to use such water until May 28, 1869, when defendants diverted the same at a point above plaintiff's mill, as alleged in the complaint and admitted in their answer. That plaintiff was charged with notice of defendants' claim, prior to any appropriation for the purposes of said mill, and to the construction of the mill. That no work was done upon nor water actually diverted from said creek, by or on behalf of the defendants, at any point as high up the creek as the point of plaintiff's appropriation, until after plaintiff's said appropriation, and that plaintiff, after using, returned said water to its natural channel, at a point above any work done by defendants or their predecessors in interest.

There is some evidence concerning an action brought by Laird against one Pearce, for the diversion of the water in controversy in this action, and that a recovery was had by Laird therefor; but, as no privity whatever is shown between Pearce and the plaintiff in this action, or his grantors, the latter is not affected by such proceeding.

Examining the special findings in the light of this evidence,

it is clear that the appropriation by defendants' grantors, found to have been made in 1865, at a point below that at which they find plaintiff's appropriation to have been made in 1867, could not justify the diversion made by defendants in 1869, complained of by plaintiff. The notice of Laird's claim was of no validity. An intention to appropriate water, to be effectual as against other parties, must be carried into actual execution with all reasonable diligence, by some known and tangible means, and at some designated point. By appropriation, a man acquires only the right of possession and user of water, qualified by the right of others to its use, in such manner as shall not materially diminish or deteriorate it, at the place of his appropriation, in quantity or quality. A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same.

The special findings conflict with the general verdict, and the latter must be set aside. The judgment must be reversed and the cause remanded, with directions to the court below to enter a judgment upon the special findings of the jury, for nominal damages in favor of the plaintiff, and a decree for perpetual injunction as prayed in the complaint.

Judgment reversed.

RANKIN, appellant, *v.* CAMPBELL et al., respondents.

PRACTICE—*verbal stipulation.* This court will not consider a verbal stipulation between the attorneys of the parties.

Appeal from the Third District, Meagher County.

THIS action was tried in the district court by SYMES, J. The decision of the court renders unnecessary a report of the facts and arguments.

CHUMASERO & CHADWICK, for appellant.

SHOBER & LOWRY, for respondents.

WARREN, C. J. In this case there is no statement on motion for a new trial or on appeal. The affidavits presented, relating to a verbal stipulation between the attorneys of the parties, cannot be considered in this court, and the judgment roll disclosing none of the errors assigned, the judgment below is affirmed.

Judgment affirmed.

STEWART et al., respondents, *v.* MILLER et al., appellants.

PRACTICE—*oral agreements.* The oral agreements of attorneys should be disregarded, although the clerk has entered them in the transcript on appeal.

EVIDENCE IN SUIT ON INJUNCTION BOND—*damages.* In an action upon an injunction bond, the obligors may prove the facts that entitle them to the injunction in mitigation of damages, if the injunction has been dissolved before the merits of the case have been adjudicated.

DISSOLUTION OF INJUNCTION—*evidence.* The dissolution of an injunction before the case has been finally determined, is *prima facie* evidence that the injunction was improperly granted.

PARTIES TO BONDS—*damages apportioned.* All the parties to a bond that has been executed jointly should be brought into court, so that the damages claimed can be apportioned.

Appeal from the Third District, Lewis and Clarke County.

STEWART, and eleven other plaintiffs, brought this action in August, 1869, against Miller and J. B. Hyde, to recover damages sustained by the granting of an injunction. The case was tried by a jury in March, 1870, and a verdict returned for plaintiffs for $1,750. On the trial the defendants, after the plaintiffs had closed their evidence, moved the court, SYMES, J., to continue the cause, and order other parties to be brought in, on the ground that a complete determination of the action could not be had without their

presence. The motion was overruled and defendants excepted.

The defendants offered in evidence the amended complaint, the answer to the same, and the injunction in another action, for the purpose of showing the following facts: That the cause of action involved in the case, in which the injunction bond sued on had been executed by defendants, had been transferred to another suit, and that the same issues were still pending between the same parties; and that the injunction had also been transferred and was still in existence.

The defendants also offered in evidence the findings of the jury and the decree in another action, and also produced certain witnesses for the purpose of showing that the parties who procured the injunction, that was issued on the filing of the bond sued on, were equitably entitled to the same, to protect them in the enjoyment of their rights to certain "springs," and that the rights of the parties had not been determined, as to the subject-matter of the injunction, at the time the injunction was dissolved and this action was brought. The foregoing evidence was excluded by the court, SYMES, J., and defendants excepted.

E. W. & J. K. TOOLE, for appellants.

The complaint shows that respondents do not seek to recover the damages sustained by six other co-obligees on the bond sued on. The court should have required the other parties to be brought in. Civ. Prac. Act, §§ 14, 17. The evidence shows that about one-half of the respondents sold out their interest in the damages recoverable on the bond sued on, before this suit was commenced, to persons who were not parties to the suit. Every action shall be prosecuted in the name of the real party in interest. Civ. Prac. Act, § 4. The parties not joined may still sue for their portion of the damages recoverable on the bond. *People* v. *Love*, 25 Cal. 529; *Fowler* v. *Frisbie*, 37 id. 34; Hill. on Inj. 64, § 26; Civ. Prac. Act, § 17; *Prader* v. *Grimm*, 28 Cal. 11; *Summers* v. *Parish*, 10 id. 347; *Baker* v. *Bartol*,

7 id. 551; Voorhies' Code, 265, *b*, *c*; *Heywood* v. *City of Buffalo*, 14 N. Y. 506.

The respondents should have shown the portion of the damages recoverable to which they were entitled. *Whitney* v. *Stark*, 8 Cal. 514; *Septembre* v. *Putnam*, 30 id. 497.

The reason for dismissing the suit and dissolving the injunction was explained by the order of the court in the premises. It was for the purpose of trying the merits of both in the same action and consolidating them. Civ. Prac. Act, § 497.

Money is recoverable upon an injunction bond on the dismissal of the action, on the theory that it is an abandonment of the rights of the plaintiff to enjoin the defendant. In this case the order of the court shows that the injunction was re-instated. Hill on Inj. 67; *Gelston* v. *Whitesides*, 3 Cal. 309; *Hicks* v. *Michael*, 15 id. 107; *Fowler* v. *Frisbie*, 37 id. 34; *Shearman* v. *New York C. M.*, 11 How. Pr. 270; *Methodist Churches* v. *Barker*, 18 N. Y. 463.

A party must prove his title to property on which he alleges his damages to have accrued, and this title can be put in issue in mitigation of damages. A voluntary dismissal of a suit does not estop the party from showing his title to the property, when that title may be the essential element on which a portion of the damages accrued. It cannot be contended that a person who is committing a trespass to the property of another is damaged, by being prevented in so doing. The dismissal of a suit does not become an adjudication on the title, and does not give a defendant, upon the dissolution of an injunction, damages he has not sustained.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for respondents.

The bill on which the injunction was granted was finally dismissed and the injunction dissolved. That was a final determination of the cause, and an action would lie on the undertaking in the cause for any damages sustained by the parties restrained. Hill, on Inj. 103, § 67; *Metho-*

dist Churches v. *Barker*, 18 N. Y. 463; *Dowling* v. *Polack*, 18 Cal. 625.

When a defect of parties is apparent on the face of the complaint, the objection must be taken advantage of by demurrer. When it is not apparent on the face of the complaint, the objection must be taken by answer. Voorhies' Code, § 148 and *n.;* Civ. Prac. Act, § 45; *Dunn* v. *Tozer*, 10 Cal. 167; *Borroughs* v. *Lott*, 19 id. 125; *Tissot* v. *Throckmorton*, 6 id. 471.

The jury were instructed, at the instance of appellants, that respondents could only recover the actual damages they sustained in consequence of the injunction. The respondents were a mining company, and the damages they sustained were joint, and the action was prosecuted in the name of the real party *in interest.*

WARREN, C. J. In this transcript of the record there appeared a clerk's entry to the effect that "the statement upon motion for a new trial being settled this day by the court, the respective parties waive the necessity of engrossing the same to be used upon the hearing of the said motion," and the transcript contains what purports to be the instructions excepted to, and the evidence given and offered on the trial. The cause was argued and submitted in this court at the last term, and in lieu of perfecting the transcript by procuring the omitted certificate of settlement of the statement, and objections to the transcript being waived by agreement of the parties in this court, the cause was heard, by leave of court, upon the basis of the statement appearing in the transcript, as though properly certified. While oral agreements of attorneys are to be disregarded, and the entry of them by a clerk gives them no additional validity so as to entitle them to notice on appeal, the respondents in this case having admitted the statement in this transcript to be the one settled by the judge below and referred to on the motion for a new trial, and the cause having been submitted upon this basis, we will consider the errors assigned upon it, although the practice is bad and not to be regarded as precedent.

The action is brought upon an injunction bond. The statement shows that appellants offered in evidence on the trial the record of proceedings had in the action in which the bond was given for the purpose of showing that the action was dismissed and the injunction dissolved for the reason that another action theretofore commenced was pending and undetermined in the same court between the same parties and involving the same subject-matter; and that the court, upon such dismissal and dissolution, holding that the application for the injunction sought should have been made in the original action and not in a separate and independent action, by order permitted the complaint filed in the latter suit to stand as an affidavit for an injunction in the original action, and the summons to be regarded as a notice to defendants of such application; all of which evidence the court excluded from the jury, to which ruling appellants excepted. In this the court erred.

Where the dissolution of an injunction is not consequent upon a final determination or adjudication upon the merits of the action, the obligors in the bond may, according to the weight of authority and principle, show the facts and circumstances entitling them to the injunction, if not in full defense, at least in mitigation of damages in an action upon the bond, the order of dissolution being in such cases only *prima facie* evidence that the injunction was improperly issued. This has been held otherwise in some of the cases cited, but seems founded in sound principle, as otherwise, the obligees in a bond given in a cause in which the action was dismissed or the injunction dissolved, upon some formal matter, although the plaintiff was in equity entitled to the protection demanded, would, in an action upon the bond, stand upon the same footing in respect to damages recoverable, as though the injunction was obtained without a shadow of equity, or even maliciously, and through perjury. This we cannot believe to be the law, and the evidence offered in this action should have been admitted.

The bond, too, having been executed by the defendants to the plaintiffs below jointly, it was necessary to a complete

determination of the rights of the parties, that all should have been in court, in order to apportion damages claimed, and if any of the obligees refused to join as plaintiffs, the court, upon the showing made, should have ordered them brought in as defendants.

The judgment is set aside and the cause remanded for a new trial.

Exceptions sustained.

BOUCHER et al., respondents, *v.* MULVERHILL, appellant.

MINING PROSPECTING PARTNERSHIP — *how formed — rights of partners.* An agreement made between parties, by which some of them prospect for gold, and the others furnish money and provisions, for which they are to receive interests in the mining grounds that may be discovered, constitutes a prospecting partnership, and those who furnish the money and provisions are entitled to pre-empt and hold mining claims under the laws of a district, which provide that claims shall be allowed the discoverers for their prospecting partners.

MINING PROSPECTING PARTNERSHIP — *rules.* A mining prospecting partnership is not governed by the technical rules of the law of commercial partnership.

MINING PROSPECTING PARTNERSHIP — *mining law regulating, valid.* The mining law of a district, which allows those who furnish money and provisions to the discoverers of placer gold mines, to hold claims without personally pre-empting them, is not against public policy and should be upheld.

PRACTICE — *instructions that mislead not given.* The court will not give an instruction, that is correct, if it will mislead the jury.

Appeal from Second District, Missoula County.

THE facts are stated in the opinion. The eighteenth section of the mining laws of the Barrette district, referred to in the opinion and briefs, is as follows: "That no claim shall be recognized as legally held, unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the discoverers for their prospecting partners."

The case was tried in June, 1870, before KNOWLES, J.

CLAGETT & DIXON, for appellant.

The respondents claimed under the exception, in section 18 of the laws of Barrette district, as prospecting partners of the discoverers. There was no evidence that respondents were the persons to whom this exception applied. The claims were recorded the day after the laws were passed.

Respondents were not prospecting or other partners of the discoverers. If they had been such partners, the record of location should have shown it, and the location should have been in their names, so that third parties would know to what parties section 18 applied.

Respondents never had actual possession of the ground in dispute; they claimed by constructive possession only, and did not bring themselves within the laws. They were not in the district when their claims were located. Appellant proved location and actual possession of the ground, and work and money expended on it.

The court erred in leaving it to the jury to find whether the claim in dispute was located according to the laws of the district, and refusing to instruct them as to what the mining laws required to make a location good. The court erred in refusing to instruct the jury as to the legal effect and meaning of the mining laws, and what it was necessary for the respondents to show to bring themselves within the laws. The construction of mining laws is for the court and not the jury. *Fairbanks* v. *Woodhouse*, 6 Cal. 433.

A mining law, allowing every discoverer to locate ground for every one who might have furnished him means or assistance to prospect, would be contrary to general law and public policy, and void.

MAYHEW & MCMURTRY, for respondents.

Miners have the right to pass laws for locating, holding and working mines, if they are reasonable and do not conflict with the laws of the Territory or United States. *English* v. *Johnson*, 17 Cal. 107. The eighteenth section is reasonable and not against public policy. Those who render material aid to prospectors for mines should be encouraged by receiving claims, if they are discover-

Mining rules should be liberally construed. The location need not show that the claims were taken up by the discoverers for respondents. The intention of the miners must be considered. Appellant's rights were not injured by the location of the ground in dispute, in the names of respondents.

The agreement of the respondents and discoverers constituted a mining adventure, in which there can be a partnership. *Sauntry* v. *Dunlap*, 12 Wis. 364.

The description of respondents, as prospecting partners in the mining laws, is immaterial. If the respondents are the parties that the miners intended to benefit by section 18, the judgment is correct. The question as to whether respondents were partners, according to the strict legal definition of the word "partnership," cannot avail the appellant. Evidence is admissible to identify particular persons. 2 Phil. Ev. 711.

Section 18, of the laws of the Barrette district, was rightfully made by the miners. *Morton* v. *Solambo C. M. Co.*, 26 Cal. 527; *St. John* v. *Kidd*, 26 id. 272; *Core* v. *McBryre*, 18 id. 582.

If the court had given all the instructions asked for by appellant, the verdict would have been the same.

SYMES, J. This was an action for the possession of a mining claim. Plaintiffs alleged that they were the owners and entitled to the possession of claim No. 5, in Barrette district, Missoula county, Montana; that in December, 1869, defendant entered upon said claim and wrongfully withheld it from plaintiffs; that the claim contained gold, and ask for possession of said claim, damages, and a restraining order until the termination of the suit.

Defendant answered and denied that plaintiffs were the owners or entitled to possession of said mining claim; admitted that he and one Halloran withheld said claim from plaintiffs; alleged ownership and possession of said claim since the 10th of December, 1869, and that it was unappropriated before that time; denied that he was working the claim, insolvency, and ask judgment for costs.

The case was tried at the June term of the Missoula county district court, and verdict found and judgment rendered for plaintiffs. Motion for new trial overruled, and appeal taken from order overruling motion, and the judgment.

Appellant asks for reversal of the case for the reasons that the verdict was against the law and the evidence, and for errors of the court below in giving and refusing instructions.

It appears by the evidence preserved in the statement, that one Barrette and Lowthier were the discoverers of Barrette district in Cedar Creek, Missoula county, Montana: that for some time before the discovery the plaintiffs had furnished said Barrette and Lowthier with money and provisions to prospect with, and had been working to get money to keep them prospecting; that previously to the discovery plaintiffs had an agreement and understanding with said Barrette and Lowthier, by which they were to locate claims for them when they made a discovery: that $200 or $300 was so furnished and was being used by said discoverers when they discovered Cedar Creek gold mine. Section 18 of the mining laws of Barrette district provides that no claim can be legally held unless the prior claimant has personally pre-empted the same, except three claims to be allowed the discoverers for their prospecting partners.

Barrette and Lowthier, as the discoverers, located said claim 5 for the plaintiffs with two others, and they claim the possessory right and title to the same under said section 18 of the mining laws of said district.

Defendant came into Cedar Creek shortly after the discovery, and finding said claim unoccupied located the same and attempted to have it recorded, but the recorder refused to record it, and referred defendant to said section 18 of the laws to show him that plaintiffs had a right to hold it under the record as it then was.

It is contended by appellant that plaintiffs cannot hold said claim under said mining law, because the evidence does not prove or show that plaintiffs were prospecting partners of the discoverers: that the agreement and understanding

between them did not, in law, form a prospecting partnership.

We do not think this agreement or understanding between the plaintiffs and the discoverers of Cedar Creek gold mine should be subjected to or tested by the technical rules of the law of partnership. It is the spirit and policy of our mining common law, sometimes called, to enforce the rules and regulations of miners, and interpret their agreements made under such rules, according to the real intention of the miners, when they do not conflict with positive law or public policy. What kind of an agreement or understanding did the miners of Cedar Creek intend, and to whom did they refer in said section 18 of their mining laws? Manifestly, from the evidence, to the plaintiffs in this case. There is no dispute but that said Barrette and Lowthier were the discoverers, that plaintiffs furnished them money and provisions for some time before the discovery, to continue to prospect for gold; and that they were living on these provisions when they made the discovery. Shall the court, because said section 18 of the laws states that the discoverers may locate three claims for their prospecting partners, and because the evidence does not show such facts as would, under the rules of commercial law, constitute a partnership, say that the plaintiffs cannot hold their claims under said mining rule or law, so evidently passed for their express benefit? We think not. Laying aside the general law of partnership, and inquiring what miners ordinarily mean by the term, "prospecting partnership," we are of opinion that the agreement or understanding, between the said discoverers of Cedar Creek gold mine and the plaintiffs below, was understood by the miners of Cedar Creek when they adopted said section 18 of their laws, to constitute a prospecting partnership, and for that reason they designated the plaintiffs as the discoverers' prospecting partners for whom they might locate and hold three claims.

We do not think said mining rule or law is against public policy, as contended by appellant. On the contrary, the agreement by which plaintiffs furnished to said discoverers

money and provisions, without which they could not have continued to prospect for the hidden precious metals, but which enabled them to discover a rich and extensive placer gold mine, thereby adding greatly to the development and wealth of our Territory, should be encouraged; as the miners in this case seem to have appreciated when they provided that the discoverers might locate, and the parties to the agreement might hold three claims, without personally pre-empting them.

The error assigned by the court's refusing to give the instruction, that if the jury did not find from the evidence that plaintiffs and said discoverers were prospecting partners, they would find for the defendant, is not sufficient to reverse the judgment. While the court might correctly have given this instruction, it might have, if given, misled the jury, by causing them to test the said agreement in this case by the law of commercial partnership.

Judgment and order of the court below affirmed.

Judgment affirmed.

NOTEWARE et al., appellants, *v.* STERNS, respondent.

PRACTICE — *agreed statement no part of judgment roll.* An agreed statement of facts, on which the case was tried and judgment rendered in the court below, forms no part of the record, and cannot be considered on appeal, unless it is included in the statement on a motion for a new trial, or saved in a bill of exceptions, or certified to by the judge as having been used on the trial.

STATUTORY CONSTRUCTION — *act of congress relating to rights of ditch owners construed — water-rights.* Under section 9 of the act of congress, entitled "An act granting the right of way to ditch and canal owners, over the public lands and for other purposes," approved July 26, 1866, a person has no right to go upon the mining ground of another and construct his ditch through the same, without the consent of the owner, unless he shows a necessity therefor, and pays the damages resulting therefrom. It was the intention of congress to give the owners of water-rights the right of way over the public domain, for the construction of ditches, to make the water available for use.

Appeal from the First District, Madison County.

THE facts appear in the opinion. Judgment was rendered in August, 1870, by WARREN, J.

W. F. SANDERS and H. N. BLAKE, for appellants.

Congress has granted the appellants the right of way for the construction of their ditch over the public domain possessed by respondent. 14 U. S. Stat. 253, § 9. The words "right of way," are used in other statutes by congress, and are to be construed the same. 14 U. S. Stat. 94, § 1; 240, § 3; 290, § 6; 294, § 2; *Doran* v. *Central P. R. Co.*, 24 Cal. 259. This law is to be construed according to the intent of congress and the object in view. Sedgw. Stat. Law, 230, 231; *Appeal of N. B. & M. R. R. Co.*, 32 Cal. 515.

The title of this act shows the intent "for the construction," etc. Sedgw. Stat. Law, 50, 51; *Flynn* v. *Abbott*, 16 Cal. 365. Previous to the passage of this act, the owners of ditches had no right to construct them through the inclosures of others, without their consent. Yale on Water Rights, 211; *Burdge* v. *Underwood*, 6 Cal. 45; *Weimer* v. *Lowery*, 11 id. 104.

Congress passed this act to give parties the rights previously denied by the courts of California. Yale on Water Rights, 211, 212, 380. The decision of the court below renders this act of no effect.

The respondent has no title or interest in the mining ground described in the pleadings that will defeat the right of way of appellants. The United States owns said ground and can make regulations and grants thereof. *Doran* v. *Central P. R. Co.*, 24 Cal. 255, 259; *Hutton* v. *Frisbie*, 37 id. 490–493; *Rector* v. *Ashley*, 6 Wall. 151; *Frisbie* v *Whitney*, 9 id. 192–197.

The statute protects the rights of respondent by giving him damages for injuries committed by appellants.

WORD & SPRATT, for respondent.

The judgment roll is all that can be reviewed in this appeal. 3 Estee's Pl. 490, 496. The agreed statement of

facts, submitted by the parties upon the issues raised by the pleadings, forms no part of the judgment roll. Civ. Prac. Act, §§ 188, 189, 190, 203.

Respondent owned the mining ground which appellants' ditch would injure. His rights thereto and the water had become vested under the law of congress, and appellants could not divest him of his rights by extending their ditch. *Weimer* v. *Lowery*, 11 Cal. 112; *Courtwright* v. *B. R. & A. W. & M. Co.*, 30 id. 573; Act of Congress of July 26, 1866, § 9; *Bear R. Co.* v. *York M. Co.*, 8 id. 330; *Hoffman* v. *Stone*, 7 id. 48; 2 Sto. on Const. 1789; Yale on Water Rights, 211, 217, 379.

When private lands are to be taken for a ditch, proceedings must first be had to obtain the right of way under the act of congress. This suit is no such proceeding. Appellants admit that they were trespassers, in taking possession of respondent's ground, and ask a court of equity to protect them in so doing. They deprive respondent of his property without "due process of law." 2 Sto. on Const. 1787; Yale on Water Rights, 211, 217; Amend. to U. S. Const. art 5.

SYMES, J. This was an action for damages and a perpetual injunction, for filling up and injuring the water-ditch of plaintiffs. The complaint alleged, in substance, that plaintiffs were the owners of a certain water-ditch in Alder gulch, and dams and reservoirs; that, for the purpose of running the water of said ditch to their mining ground, they commenced the construction of an additional ditch; that, in order to run said ditch to their mining ground, it was necessary to construct the same across the mining ground of defendant; that they went upon defendant's ground and constructed some portion of their ditch, when they were prevented from further constructing said ditch, and the defendant filled up the same; and plaintiffs ask judgment for damages, and that defendant be restrained perpetually from interfering with plaintiffs constructing their ditch through or over defendant's mining ground.

Defendant answered, and admitted plaintiffs' ownership of ditch and water-right; alleged that he was the owner of 450 feet of mining ground below plaintiffs' dam and reservoir; that it was worth $2,000, and he had been the owner thereof since 1863; admitted that plaintiffs went on his ground and attempted to dig a ditch, without his consent, and that he filled up said ditch; denied that he interfered with plaintiffs' ditch, except on his own ground; further answering, alleged that the construction of said ditch over or through his mining ground would produce great and irreparable injury to the same, and render it wholly worthless; and that it was not necessary for plaintiffs to construct said ditch across his ground to enable them to save and conduct their surplus water to their mining ground; that constructing said ditch across his ground would deprive him of the use of the waters of Alder gulch for mining, to which he is entitled; denied irreparable injury, insolvency and damage, and asked judgment for costs.

Plaintiffs replied, but as no replication was necessary it is unnecessary to notice it.

The case was tried before the court below on an agreed statement of facts, and judgment of nonsuit rendered against the plaintiffs, an appeal taken from the judgment roll, no bill of exceptions, or statement on appeal, appearing in the record.

There appears, in the transcript, an agreed statement of facts, on which the case seems to have been tried. This agreed statement of facts not being included in a statement on appeal, and settled or agreed to in accordance with section 323 of the Civil Code, nor saved nor included in a bill of exceptions, nor designated or referred to as having been used on the trial by a certificate of the judge, it forms no part of the record which we can consider on appeal.

Then the only questions presented are, did the court below err in rendering judgment of nonsuit on the pleadings and facts found by the court? The court found that defendant was the owner of the mining ground, over and through which plaintiffs attempted, without consent of de-

fendant, to construct their ditch; that the construction of said ditch would greatly injure and damage defendant, and, to a great extent, deprive him of the use of his mining ground, and the waters of Alder gulch running over and through the same; that defendant and his grantors had located and possessed said property since the year 1863, and had prior and superior rights to the same and the enjoyment thereof; that the plaintiffs had not paid, or offered to pay, the said defendant for any damage he had or would sustain by reason of the construction of the said ditch over his mining ground; and that defendant was not guilty of the wrongs and trespasses alleged against him in plaintiffs' complaint.

It is contended by plaintiffs below that, under the act of congress entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26, 1866 (14 U. S. Stat. at Large, 253, § 9), the plaintiffs had the legal right to go on the defendant's mining ground, and construct their ditch over, through and across the same, without the consent of the defendant; and that, because the defendant prevented them from so doing, and filled up that portion of the ditch on his ground, plaintiffs are entitled to a judgment for damages and a perpetual injunction. So far as our information goes, section 9 of the act of congress mentioned has never received any judicial construction; and the record in this case does not call upon us to construe it so fully as to present those original and interesting questions which must eventually arise under this law. We do not think it was the intention of congress, when it said that the right of way for the construction of ditches and canals, over the public domain, for carrying water for mining and other purposes, is acknowledged and confirmed to those who, by the local laws and customs, have vested rights therein, to enact that one person may go at his pleasure on the mining ground of another, without the latter's consent, and construct through or over the same a ditch or canal, which would greatly damage or almost destroy the vested rights of the owner, without

showing a necessity therefor, and paying or securing the damage to result therefrom.

The findings of the court show this to be about the state of circumstances under which the plaintiffs ask the court to perpetually enjoin the defendant from interfering, in any way, to prevent the construction of their ditch through his property; and there was no error in the judgment of the court below.

We think it was the intention of congress to give the right of way over the public domain to those owning water-rights, for the construction of ditches and canals, to make the same available for useful and beneficial purposes; but what degree of necessity must exist to give the right to construct a ditch or canal over or through land or mining ground possessed by another, in which valuable vested rights have accrued under the same law, to the partial or total destruction of those rights, when and how the damages resulting from the construction of such ditch or canal must be paid or secured; and, in case of the owner's refusing and preventing the digging of the ditch on ground lawfully possessed by him, the proper mode of procedure, to enforce the rights given by said law of congress, are questions not presented in this case.

Judgment affirmed.

TAYLOR et al., appellants, *v.* STEWART et al., respondents.

PRACTICE—*finding of fact—admissions.* A note "not submitted for the reason that defendants conceded these facts," which was written by the judge at the trial in refusing to submit an issue to the jury, is not the finding of a fact stated in the issue, nor a record of its admission.

PRACTICE—*manner of admitting facts.* The admission of a fact during the trial must be made by the party, or his attorney, in a distinct and formal manner in open court and imports verity.

PRACTICE — *refusal to submit issues.* It is error for the court to refuse to submit an issue to the jury on the ground that it is an admitted fact, if there has not been a solemn admission of the fact.

PRACTICE — *exceptions to reasons.* Parties cannot except to the reasons given by the court for its rulings.

Appeal from the Third District, Lewis and Clarke County

THIS action was tried in October, 1869, before SYMES, J.

The jury found the following special findings: That Taylor and others, at the time of the commencement of the suit, did not have the exclusive right, by prior appropriation, to the water flowing from the springs in dispute; that Taylor and others appropriated and run in their pipes about nine inches of water; that the citizens of Helena had no other means of procuring water except these springs at the time the pipes were put to the springs; that Stewart and others were using the water flowing into Last Chance gulch, for mining purposes on other claims in said gulch, before they commenced mining on the ground the springs were on, and before Taylor and others put their pipes to the springs and appropriated the same; that the miners of Last Chance gulch and Stewart and others, up to December 2, 1867, never used for mining purposes any water of these springs, except such portion as exceeded the amount used by the citizens of Helena; and that Taylor and others, up to December 2, 1867, did not divert from the miners of Last Chance gulch, or Stewart and others, more of said water than the citizens of Helena used. The action was commenced on December 2, 1867.

The other facts appear in the opinion.

WOOLFOLK & TOOLE, for appellants.

It is admitted that appellants supplied Helena with water from certain springs; that respondents were working in the vicinity of the springs, and would sink the springs if they continued to work; that appellants took up this water before respondents located their mining ground; and that appellants claimed only a portion of those springs.

Appellants were entitled to protection in the enjoyment of a portion of the springs as much as if they owned the whole. *McKinney* v. *Smith*, 21 Cal. 374.

Did the court enter the proper decree upon these findings and admissions? Civ. Prac. Act, § 174; *Lucas* v. *City of San Francisco*, 28 Cal. 591; *Allen* v. *Hill*, 16 id. 117.

There is nothing in the findings that will justify respondents in sinking the springs in dispute. They were not the oldest appropriators of the springs. It does not appear that respondents owned the "other claims," referred to in the findings, or had any title to the water used upon them, at the time any of the respondents mined the "other claims." Special findings, if relied upon as the basis of a judgment, must be sufficient to show a legal conclusion of liability, without reference to extrinsic facts. *Woodson* v. *McCune*, 17 Cal. 298; *Garfield* v. *K. F. & T. M. W. Co.*, id. 512.

Admitting that respondents had appropriated water to use on mining claims below the springs, before appellants had laid their pipes, respondents had no right to come up to the source of the springs, after the appellants had laid their pipes, and then locate other claims and sink the springs in working them. *Nevada W. Co.* v. *Powell*, 34 Cal. 109. This action did not involve the rights of respondents to use the water on the "other claims." The findings of the jury show that none of the respondents or miners ever appropriated that portion of the springs that flowed in the pipes of appellants. Respondents failed to show any title to the springs or right to sink them.

The findings and admissions entitled appellants to an injunction and a decree of title to nine inches of the water. Prior appropriation of water is entitled to protection. *Leroroni* v. *Miller*, 34 Cal. 234; *Hill* v. *Smith*, 27 id. 476.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for respondents.

Appellants can claim no rights on account of the rights of the citizens of Helena to the use of the springs. The record does not show the evidence in that court below, and

this court cannot disturb the judgment without the evidence and admitted facts. Appellants were not entitled to an injunction under the facts found by the jury. Angell on Water-courses, 121–124. The findings do not show that appellants were entitled to any affirmative relief against respondents. Respondents asked for no affirmative relief.

All presumptions are in favor of the correctness of the judgment of the court below, and the judgment should be affirmed. *Owen* v. *Morton*, 24 Cal. 375; *Emmal* v. *Webb*, 36 id. 197.

KNOWLES, J. This is an action for an injunction to restrain the respondents from so working certain mining grounds as to sink certain springs, the waters of which appellants had appropriated.

The court below, on the findings of the jury, refused to grant the prayer of appellants, and gave judgment to the respondents for costs. From this judgment appellants appeal to this court. There are no assignments of error in the transcript. The only exception that appears in the record is one to the ruling of the court in refusing to sustain appellants' motion for a decree. This, then, is the only point this court can consider.

Appellants claim that the findings of the jury, together with the admissions of respondents, entitled them to a decree. The findings of the jury alone were not sufficient to entitle them to this. In any light in which this case can be considered, to entitle appellants to recover, it was necessary for them to establish the fact that they appropriated the waters of these springs before respondents located the mining ground, the working of which was sinking them. The jury did not find any such fact; no issue involving such a fact was submitted to them. The appellants, however, claim that respondents admitted this fact. They requested the court below to submit to the jury this issue:

"Did the plaintiffs and their grantors appropriate so much of the waters of the springs in controversy, as was necessary to furnish and supply the citizens and inhabitants

of Helena with water for drinking, culinary and other purposes, before defendants took up and located their mining ground?"

To this the court appended the following note: "Not submitted, for the reason that defendants conceded these facts."

The question presents itself: How did defendants concede this fact? It is not admitted in the pleadings, for the defendants join issue upon it in their answer. Can this note be considered the record of the admission of this fact by the attorneys for respondents, in open court, or by the respondents themselves, to save time or the expense of proving it?

There is no difference, I conceive, in the manner in which this admission should be made, whether by the parties themselves or their attorneys. Greenleaf, in his work on Evidence, vol. 1, § 186, says of admissions of attorneys in open court for this purpose: "But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or the dispensing with the formal proof of some fact at the trial."

Can this note of the judge, assigning reasons for not submitting an issue to a jury, be considered the record or evidence of such a formal, distinct and solemn admission as is here contemplated? It was not made for that purpose. Neither one of the parties, as far as the record shows, had any thing to do with this record, if it can be called one. The appellants, who were the most interested in having such an admission made, asked to have an issue presented to the jury to determine these facts; and they ask the court to instruct the jury that this issue is the only one they have to deal with, so far as the controversy, as to the right to mine the ground upon which the springs are situated, is concerned. Surely the appellants could not have understood that any formal and solemn admission of this fact nad been made by respondents, as to dispense with their proving it. If this is such a solemn or formal admission

of this fact, then it imports verity, and this court must consider that it was made in open court in a direct and formal manner. If this was not the truth, the only way it could be attacked would be directly to correct the record; yet, undoubtedly, in this case, had appellants objected to the ruling of the court in not submitting this issue to the jury, and had presented this court with a full and complete transcript of all the proceedings therein, and it did not appear that any formal or solemn admission had been made of this fact, this court would certainly have found that there was error sufficient to reverse the judgment of the court below, unless, after further consideration, it was found that respondents ought to have judgment notwithstanding this fact.

It cannot, then, be said that this is such a record of that admission as imports verity; for we have seen that, had the ruling been excepted to, without some support it would fall, while, if it imported verity, it would rest upon itself and need no support.

The only question presented the court was, whether or not to submit this issue. To the ruling upon this point the parties might except. It would be an anomaly in practice to require parties to examine the reasons a court might assign for a ruling and except to these. They might be wrong and the ruling right. For these reasons this court must hold that this note of the judge was no record of any such admission. There was a similar note to some other issues the appellants asked to be submitted. These, however, stand upon the same footing as the one considered.

If it is claimed that this is not the record of such formal or solemn admissions as those treated of above, it may be answered that no other class of admissions require such a record to be made of them. The general admissions of parties are only evidence in the cause, which might go to the jury to be taken into consideration by them in making up their findings. Neither can this be considered as a finding by the court. The court does not pretend to find the fact. The note of the judge was not appended for any such

purpose. To give this note any other or more extended meaning than the court intended, would not be good practice. The court intended it only as a reason for his ruling, and not as the record of an admission or as a finding.

Appellants should have asked the court to have found this fact, or to present the issue to the jury for them to find it. When refused they should have excepted, unless they could present to this court some proper record of the admission of the fact.

The judgment of the court below is affirmed.

Judgment affirmed.

MING, respondent, *v.* TRUETT, appellant.

PROBATE JUDGE—*powers under town-site act.* The law which confers upon a probate judge the power to enter public lands for town sites and award town lots to the citizens, does not grant him any judicial powers, but prescribes his duties, which are ministerial.

PROBATE JUDGE—*compensation as attorney in his court.* A probate judge can practice as an attorney in his court, and is entitled to receive compensation for making applications for the entry of town lots and taking the affidavits to them at the request of his employer.

CRIMINAL LAW—*extortion.* A person who demands and receives illegal fees as an officer, or under the color of his office, is guilty of extortion.

PRACTICE—*judgment—presumption in favor of.* This court will presume, if the contrary does not appear upon the record, that the court below found facts sufficient to support the judgment.

PRACTICE—*judgment—conflicting evidence.* This court will not reverse a judgment, if the testimony is conflicting, although the weight of evidence appears to be against the finding of the court below.

ILLEGAL FEES—*recovery of.* A civil suit to recover illegal fees, which had been demanded and received under color of office, can be brought against an officer who has not been convicted in a criminal action.

Appeal from the Third District, Lewis and Clarke County.

MING commenced this action against Truett, probate judge of Lewis and Clarke county, to recover $396, being treble the amount of fees that were alleged to have been illegally charged and received by said Truett, as such judge, in Octo-

ber, 1869. The case was tried by SYMES, J., who rendered a judgment for Ming. This action was brought under the following statute, approved January 14, 1869: "If any judge * * * or other officer * * * of this Territory, ministerial or judicial, shall receive or take any fee or reward, to do or execute his duty as such officer, except such as is or shall be allowed by law; or if any such officer shall ask, demand or receive (either before or after service performed) any other or greater fees than are allowed by law, every such officer so offending shall be deemed guilty of extortion, and on conviction shall be fined in any sum not less than $200 nor more than $1,000, and on conviction be removed from office, and shall, at the suit of the party aggrieved, be liable for treble the amount of the fees so illegally charged and received."

The other facts appear in the opinion.

CHUMASERO & CHADWICK and G. MAY, for appellant.

The territorial statute, relating to extortion, exists in nearly every State, and has been often construed. All the authorities hold that the money received by the officer must have been paid him by the party aggrieved to do his duty as such officer. If the money demanded was for services rendered outside of his official duties, the case is not within the statute and respondent cannot sustain his action. *Shattuck* v. *Woods*, 1 Pick. 173; *Dunlap* v. *Curtis*, 10 Mass. 211; *Commonwealth* v. *Shed*, 1 id. 228. If the officer thought he had a right to the extra compensation, the action will not lie. *Runnels* v. *Fletcher*, 15 Mass. 525.

The testimony of appellant and Addoms shows that respondent requested them to make out the applications for the town lots, and that they explained to him that the money charged was in payment of such services, which the law did not require appellant to perform.

The action is criminal in its nature and must be supported by the same evidence that would support an indictment. In this case the weight of the evidence is in favor of appellant. It was not proven that the money received by appellant was

received for the performance of official business. *Hatch* v. *Mann*, 15 Wend. 48; *Commonwealth* v. *Pease*, 16 Mass. 93.

The judgment could not be rendered on the complaint, as it does not set forth sufficient facts to entitle respondent to recover. *Williams* v. *Hingham*, 4 Pick. 344. It is not claimed that appellant received the fees by virtue of a fee bill as probate judge.

Under the statute, under which this action is brought, a conviction under a criminal prosecution, by indictment, must precede the removal from office and the recovery of the penalty of treble damages. Respondent cannot recover unless he avers and proves such a conviction of appellant of extortion. The treble damages is a pecuniary penalty attached to a statutory punishment.

The judgment was against the evidence, and should be reversed. *Bedford* v. *State*, 5 Humph. 552; 1 Gr. & W. New T. 361, 367; 3 id. 1228–9; Hill. on New T. 47, 50.

W. E. CULLEN and S. WORD, for respondent.

The statement does not specify wherein the evidence is insufficient to justify the verdict, as required by the statute. Prac. Act, § 195; *Caldwell* v. *Greeley*, 5 Nev. 260; *Prales* v. *Pacific G. S. M. Co.*, 35 Cal. 37; *Beans* v. *Emanily*, 36 id. 121; *Butterfield* v. *C. P. R. R. Co.*, 37 id. 381, and cases cited.

The judgment cannot be reversed because the statement shows that there was some evidence to sustain it, although the testimony may be conflicting. Hill. on New T. 17, 21, 50; *McNeil* v. *Shirley*, 33 Cal. 202; *Hardenburgh* v. *Bacon*, 33 id. 356, and cases cited.

The legal presumption is in favor of the judgment of the court below. Error must be affirmatively shown. *Bellows* v. *Sackett*, 15 Barb. 96; *Grant* v. *Moore*, 22 N. Y. 323; *Oakley* v. *Van Horn*, 21 Wend. 305; *Phelps* v. *McDonald*, 26 N. Y. 82.

The imposition of new duties, or duties for the performance of which no fees have been given by the legislature, does not entitle the officer to any fee therefor. A charge

for such service is extortion. Fees are never allowed by implication, nor can an officer charge reasonable compensation for the performance of such service. *People* v. *Supervisors of N. Y.*, 1 Hill. 367; *De Boro* v. *Trustees of Cinn.*, 7 Ohio St. 237; *Andrews* v. *United States*, 2 Story, 202; *United States* v. *Brown*, 9 How. 487.

The complaint is sufficient under the statute.

KNOWLES, J. The complaint in this action shows that the respondent paid appellant $4 per lot for thirty-three town lots, which he had made application to enter in the town plat of Helena, the same being appellant's fees, which the law allows for hearing proofs and executing deeds therefor, in accordance with the town site act of this Territory. That afterward appellant demanded of him $4 more per lot on said number of lots, as such fees, which respondent paid under protest.

Appellant's answer puts in issue these allegations in part, and avers that the first $4 per lot which he received of respondent were charges for making out thirty-three applications for the entry of said lots and taking the affidavits thereto, and that the same was done at the special instance and request of respondent.

If the appellant had established the truth of these averments in his answer, we would hold that he was not liable in this action. The law conferring upon the probate judge the power to enter public lands upon which any town is located, and awarding to its citizens town lots under the provisions of law, does not purport to confer upon him any judicial powers. The power is conferred upon him, and not upon his court. He is simply designated as the trustee for the benefit of the citizens of the town. His duties in allowing entries of lots are prescribed by law, and he acts in a ministerial capacity. If he acted as a court, parties contesting the right to make entries would be entitled to a jury to decide upon the facts presented in the issue. The law, then, prohibiting probate judges from practicing

law in their own courts does not apply, as he does not sit in determining these questions as a court.

Admitting, however, that the probate judge, in allowing entries for town lots, does act in a judicial capacity, if appellant received this $4 per lot as attorney fees, for making out applications for entries, then this action does not lie.

This action is brought to recover fees and a penalty of appellant, which fees, it is claimed, were illegally demanded and received as fees allowed him, as probate judge, by law, for hearing proofs and executing deeds as prescribed by the aforesaid town site act. If they were demanded as attorney fees, and received as such, they could not be demanded and received as fees for the above-named purposes. This action will lie only in case of extortion. To constitute extortion at common law, and under the statute under which this action was brought, it must appear that the person accused demanded and received the illegal fees as an officer, or under the color of his office. The statute under which this action was brought is a penal statute, and must be construed strictly. No considerations of public policy would allow this court to construe it so as to embrace an offense not clearly within its terms. If appellant received these fees as attorney fees, and it was unlawful for him to receive an attorney fee in the case, still this would not amount to extortion, and this action would not lie, for he would not demand and receive such fees under the color of office. An action for money had and received might apply.

Finally, we do not think the fees set forth can be called exclusively attorney's fees. An attorney might receive such fees, and also any one who was not an attorney. It would not require any person to have a license to practice law, to be authorized to make such applications. Any one making out such applications could not, for this reason, be said to be practicing law, and required to procure a revenue license as such; and, as we have before seen, the tribunal in which the applications are filed is not a court. The making out applications for the entry of town lots, and taking the affi-

davits thereto, as prescribed by law, were not duties which appellant could be called upon to do as the duties of his office.

The court below, upon the trial, gave judgment for respondent. This court must presume that the court, as the contrary does not appear upon the record, found facts sufficient to warrant the judgment. In other words, this court must presume, as the contrary does not appear, that the court below found that appellant did receive these fees as probate judge, and as fees allowed him by law for performing the duties of his trust. This being found, $4 per lot of these fees were undoubtedly illegal, and the demanding and receiving of them, under our statute, was extortion.

The testimony presented in the record is conflicting upon this point; and, although it may appear to us that the weight of evidence was against the conclusion arrived at, the well-settled principles of law will not allow us, in such cases, to interfere.

The court below observes the witnesses, their character, their manner and the probabilities of their evidence, and is intrusted with the delicate and often difficult task of giving such weight to the testimony of each one as seems to him just and proper; and it must be considered by us that, in so regarding the evidence in the court below, in this case it was found that the weight of evidence was in favor of respondent.

We do not think the point well taken, that appellant should have been convicted in a criminal action before this one would lie. This action should not depend upon the criminal action. There is no reason in requiring a party to allege and prove that any one complained of had been convicted of the crime of extortion before he would be entitled to recover in a civil action, as this fact would have no bearing on the gist of the issue, namely: as to whether, under the color of office, illegal fees had been demanded and received. Surely the record in the criminal case could not be introduced to prove this. If so it would be conclusive, and no jury would be needed to determine the issue. The

determination of the criminal action, in fact, would determine both. Such cannot be the proper construction of the statute. A reasonable construction of a statute must be made if possible.

The judgment of the court below is

Affirmed.

The appellant applied for a rehearing in this case at the August term, 1871.

WADE, C. J. This case was tried at the January term of this court, 1871, and it is now before the court upon a motion for a rehearing on behalf of the appellant. If we could look at the evidence in this case as disclosed by the record, we should have no hesitation in reversing the judgment of the court below, for the reason that the evidence clearly and decidedly preponderates in favor of the defendant. But there being *some* evidence to support the judgment, the action of this court is restrained and controlled by a long course of decisions which declare that the judgment of the lower court will be affirmed if there is evidence to sustain it. This rule has been too long settled to be now disturbed, and although it may work injustice in particular cases, yet the experience of a long period of time has vindicated its wisdom and propriety.

This is a civil action, and the rule that the evidence must exclude every reasonable doubt does not apply.

To set aside a verdict or judgment in a case where there was evidence on both sides, there must be such a preponderance of evidence as to satisfy the court that there was either an absolute mistake on the part of the jury or that they acted under the influence of prejudice, passion or corruption. *Cohen* v. *Dupont*, 1 Sandf. 260 ; *McGetrick* v. *Wason*, 4 Ohio St. 566.

If there was a conflict of evidence on a question of fact, rightly submitted to the jury, the court will not, in general, grant a new trial on the ground that the verdict is against

evidence, even though they deem the conclusion reached by the jury erroneous. *Winthell* v. *Latham*, 6 Cow. 682; *Fleming* v. *Holenbeck*, 7 Barb. 271; *Adsit* v. *Wilson*, 7 How. Pr. 64; *Mackey* v. *N. Y. C. R. R. Co.*, 27 Barb. 528; *Stoddard* v. *Long I. R. R. Co.*, 5 Sandf. 180; *Arbenthy* v. *Wayne Co. Bank*, 5 Ohio St. 266.

The findings of a court when substituted for a jury are entitled to the same consideration as the verdict of the latter. *Merrick* v. *Bowrey*, 4 Ohio St. 60.

These rules apply with much stronger force in an appellate court where the evidence, as spread upon the record, is necessarily imperfect, and where the means of weighing the feeling, the interest, the passion, or the prejudice of the witness, is beyond our reach.

Rehearing denied.

KINNA, appellant, *v.* HORN et al., respondents.

PRACTICE—*judgment reversed for irrelevant instructions.* A judgment will be reversed if the instructions of the court below upon irrelevant and immaterial issues are erroneous, and calculated to mislead the jury.

Appeal from the Third District, Lewis and Clarke County.

KINNA brought this action against Horn and Marvin, as partners, to recover for goods sold and delivered, moneys advanced and services rendered to the firm. Marvin did not appear, and Horn filed a separate answer, and denied that he and Marvin were partners, and that he was liable personally on account of the matters alleged in Kinna's complaint.

The case was tried in July, 1870, and the jury rendered a verdict for Horn. Kinna moved for a new trial on the ground that the instructions given by the court were erroneous

The court, SYMES, J., overruled the motion and Kinna appealed.

The instructions, to the giving of which Kinna excepted, were as follows:

"1. If the jury believe, from the evidence, that the goods bought in St. Louis for the firm of Horn & Marvin were in reality bought for Frederick Horn, one of the defendants, under a contract or agreement with said Horn, then plaintiffs cannot recover in this action for said goods.

"2. If the jury believe, from the evidence, that the goods charged as sold to the firm of Horn & Marvin were in reality sold to Horn or Marvin individually, and not upon any firm account, then the plaintiff cannot recover for such goods in this action.

"3. Even if the defendants were partners during the time such goods were furnished to them as such partners, yet if the jury find from the evidence that either of the defendants, Horn or Marvin, have paid for said goods, or rendered services to the amount thereof, which has not been paid, then the plaintiff cannot recover therefor, and in no event can recover more than the balance due upon said goods.

"4. If the jury believe, from the evidence, that plaintiff has never delivered the goods to defendants, which he claims to have purchased for them, then, unless he has offered to deliver said goods to defendants before the institution of this action, they will find for defendants as regards the contract for the St. Louis goods.

"5. The offer to deliver the goods, to be effectual in this action, should be clearly proved.

"6. The defendant had a right to inspect the goods claimed to have been purchased for his benefit, and to know that they were such as had been ordered, before being compelled to receive the same, or to pay therefor, before the commencement of this action.

"10. If the jury find for plaintiff, they will only find in such amount as is still due, after deducting any payments made by defendants.

"11. It was the duty of plaintiff to set apart all the goods

purchased for defendant and not suffer them to be mingled with his own, and if the jury find from the evidence that plaintiff has never separated said goods from his own since their arrival in Helena, then he cannot recover for said goods.

12. If the jury believe, from the evidence, that plaintiff has released the defendant Marvin from all liability on the joint indebtedness sued on, then the defendant Horn is also released therefrom."

W. F. SANDERS, for appellant.

The denials of Horn are insufficient, so far as they relate to his individual liability for the partnership account sued on. *Whitwell* v. *Thomas*, 9 Cal. 499.

The jury found, for aught we know, that appellant complied with his contract fully; but the court instructed them that this was not enough. After the arrival of the goods in Helena, the court says in effect, to the jury, it was a condition precedent to a recovery that appellant should permit an inspection; separate goods from his own; offer to deliver goods, or deliver them. No one of these conditions was a part of appellant's contract, nor did any witness so state or claim. Instructions 4, 5, 6, 11.

There was no plea of payment, nor of release of Marvin, but the court instructed the jury as to payments. Instructions 3, 10, 12.

The fifth instruction was clearly wrong. The court misled the jury by treating the part of the case for money advanced as for goods sold and delivered, and talked to the jury about plaintiff's recovery for the St. Louis goods. Instruction 11.

E. W. & J. K. TOOLE, for respondent.

If a special agent violates his instructions, and confuses his goods and those of his principal, he forfeits his commission, and is liable for damages for such disobedience or confusion. Every doubtful circumstance would be construed unfavorably to the agent. Story on Agency, 395. An agent

who voluntarily makes advances for his principal cannot be re-imbursed. Story on Agency, 398.

If a person having charge of another's property confounds it with his own, so that it cannot be distinguished, he must suffer the inconveniences thereof and pay the dam ages therefor. *Hart* v. *Ten Eyck*, 2 Johns. Ch. 108.

An agent renders himself personally liable when he makes a contract without any authority. *Meech* v. *Smith*, 7 W end. 315.

An agent having his principal's money to purchase a bill of exchange should so buy the same, and not use his own credit. *Hays* v. *Stone*, 7 Hill, 128; *Stone* v. *Hays*, 3 Denio, 575.

Appellant errs in assuming that the money was laid out for Horn. Pars. on Merc. Law, 161; *Stone* v. *Hays*, 3 Denio, 575.

The jury are not supposed to have found on issues not raised by the pleadings. *Gifford* v. *Carvill*, 29 Cal. 589; *Bernal* v. *Gleim*, 33 id. 669.

WARREN, C. J. The only issue raised by the separate answer of Horn, in this cause, was upon the allegation of partnership liabilities of the defendants. The other denials are of individual indebtedness or liability of himself, which is not alleged in the complaint, and are wholly irrelevant and immaterial. The instructions given by the court upon other matters not embraced in the issue were calculated to mislead the jury, and were erroneous.

For this reason the judgment is reversed and the cause remanded.

Exceptions sustained

BOHM, respondent, *v.* DUNPHY et al., appellants

LANDLORD AND TENANT—*distraint for rent superseded.* The common-law right of distraint for rent is not applicable to the condition of this Territory, and has been superseded by the statutory remedies which have been given to the landlord.

PRACTICE—*review of issues of law in defective answer.* This court will review on appeal an issue of law raised by a demurrer to the answer, which has been waived by the filing of a replication, if the answer is defective in matters of substance which cannot be cured by the verdict.

DAMAGES—*measure of, for distraining rent illegally.* In an action to recover damages for the wrongful taking and conversion of money by another under a distress warrant for rent due from a third person, the party is entitled to recover the amount that was so taken and converted, with legal interest for its detention, and exemplary damages.

DAMAGES—*awarding of exemplary—recklessness.* Exemplary damages are only given when a willful act is complained of, or there is either a wanton recklessness or a deliberate intention to injure.

EVIDENCE—*exemplary damages—mitigation—legal advice.* In a suit to recover exemplary damages, a party can prove, as a mitigating fact, that he had acted in good faith under the advice of an attorney.

PARTNERSHIP—*surviving partner can recover exemplary damages—evidence.* A surviving partner can recover exemplary damages for the wrongful conversion of partnership property; but personal matters that affect only the deceased cannot be given in evidence, although they might have been properly admitted in aggravation of the damages during his life-time.

Appeal from the Third District, Lewis and Clarke County.

ON February 27, 1868, Bohm and Aub brought this suit against Dunphy, Bentley, Armitage, Morse and John Doe to recover $25,000, damages. The complaint alleged that the defendants entered into the banking-house of plaintiffs in Helena on February 26, 1868, and by force and violence, willfully and wrongfully took and carried away $2,000, the property of plaintiffs, and that they detained $1,935 of said sum.

Dunphy, Bentley and Armitage filed their answer on March 7, 1868, and alleged that they took $1,935 on certain premises owned by Dunphy and Bentley, on a portion of which plaintiffs had their banking-house; that T. P. Ames had used and occupied the same as a tenant of Dunphy and Bentley ever since November 14, 1866, and owed therefor on

ebruary 26, 1868, $1,965; that Dunphy and Bentley, with Armitage as their bailiff, entered on said premises and took said amount "justly as for and in the name of a distress for the said rent so due;" that Dunphy and Bentley during said time were landlords of Ames of the premises; and that said amount remained due.

Morse answered on March 6, 1868, and denied every allegation of the complaint.

The plaintiffs then filed their demurrer to the answer of Dunphy, Bentley and Armitage for the following reasons: "No. 1. The allegation that rent was due defendants from Thomas P. Ames does not justify defendants in robbing the bank of plaintiffs. No. 2. There is no allegation in said complaint that plaintiffs are tenants of Dunphy and Bentley, or owe them rent. No. 3. Because Dunphy and Bentley have no right to take or distrain the money or other property of the plaintiffs for any rent that may be due them from any other persons. No. 4. Because under the laws of Montana Territory there is no provision for a distress for rent, and the common-law doctrine of distress is in conflict with the statutes of this Territory."

The demurrer was overruled in October, 1868, by the court, MUNSON, J., and plaintiffs excepted.

On October 29, 1868, the death of Aub was suggested, and the action was ordered to be continued in the name of the survivor Bohm.

The plaintiffs filed their replication to the answer of Dunphy, Bentley and Armitage on October 31, 1868, and denied the allegations thereof, and alleged that Bohm and Aub on October 25, 1867, rented their banking-house from Ames; that they had paid Ames the rent as soon as it was due; that Dunphy and Bentley were never the landlords of Bohm and Aub, and that there was no privity between them; that the lease from Dunphy and Bentley to Ames expired, and Dunphy and Bentley obtained a judgment for the recovery of said premises on November 7, 1867, under the forcible entry and detainer law of Montana; that an appeal was taken from said judgment, which was pending

at the time the money was taken from plaintiffs; that defendants did not impound said property so taken, as required by the common law of distraint; that defendants converted the same to their own use, and plaintiffs could not replevy it; and that defendants did not comply with said law of distraint.

The distress warrant was directed to Armitage, and, after reciting that Ames owed Dunphy and Bentley $1,937.50 for the rent of the premises, concluded as follows:

"Now, therefore, you are commanded to enter upon the said premises above described, and make distress according to law upon any personal property, money or effects which you may find upon the premises aforesaid, and, if the money is not paid, that you make sale according to law.

"In witness whereof we have subscribed this warrant this 22d day of February, A. D. 1868.

"E. M. DUNPHY,
"D. A. BENTLEY."

The following return was indorsed on this warrant:

"HELENA, *February* 26, 1868.

"In pursuance of the within direction I entered upon the premises within named, and distrained upon nineteen hundred and thirty-five dollars ($1,935.00), and delivered the same to Dunphy & Bentley.

"J. ARMITAGE."

The action was tried in July, 1870, before SYMES, J., and the jury returned a verdict for plaintiffs.

The eighth instruction given by the court was as follows: "The fact that the defendants acted under advice of counsel can have no force in the case. If you believe, from the evidence, that it was the intention and purpose of defendants to take said money and appropriate it to the payment of their debt from Ames to Dunphy and Bentley, and not to hold it and give the plaintiffs an opportunity to replevy the same, the law implies that such act was willful, and you may find such exemplary damages as you consider just."

The other facts appear in the opinion.

CHUMASERO & CHADWICK, for appellants.

By the common law all movable goods and chattels which might be found upon the premises, whether the goods of the tenant, under-tenant or other person, might be taken as a distress for rent. All the evidence introduced on the questions relating to respondent renting the premises from Ames, and that of privity between appellants and respondent, was immaterial, and tended to mislead the jury from the true issues. Taylor on. L. & T., § 583; *Holt* v. *Johnson*, 14 Johns. 425; *Spencer* v. *McGowen*, 13 Wend. 256; 1 Smith's Lead. Cas. 534, 535.

The case of *Dunphy and Bentley* v. *Ames* had been appealed to the district court. Under our statute there must be a trial *de novo;* the whole case is left to stand on the pleadings only. The answer of Ames shows a continuing tenancy. The court erred in allowing the proceedings in this case to be introduced in evidence.

The English courts hold that money, if it can be identified, is the subject of distress. The property in controversy is national currency, and each bill was numbered and lettered and could be identified.

Our statutes provide expressly that the common law of England, so far as it is applicable and of a general nature, shall be the law, etc. Acts 1865, 356.

The acts of the States, adopting the common law, fix the date of its existence, and generally adopt it as it existed when the acts were passed. Our courts have decided that the statutes of England, in amendment of the common law, are a part of it. 1 Kent's Com. 522–524; *Patterson* v. *Winn*, 5 Pet. 241.

The act 11 George II, ch. 19, changes what had been previously held to be the law, and declares: "That when the distress is for rent, an irregularity or unlawful act subsequently done by a party shall not render him a trespasser *ab initio;* but the party aggrieved by such unlawful act may recover for the damages sustained by such act." *Sackrider* v. *McDonald*, 10 Johns. 264.

The impounding of property taken as a distress, was for the purpose of keeping it safely. It was to be kept as a pledge; but a change was made by statute 51 Henry III, authorizing a sale in fifteen days. 3 Kent's Com. 474. If the property was not replevied in five days, the landlord had a right to sell. Stat. Wm. & M., ch. 5; 8 Anne, ch. 14.

Respondents, on February 27th, commenced their action of trespass. On the 29th they commenced their action of replevin, and subsequently dismissed it. Respondents elected to bring trespass, and waived their right to replevin.

The court erred in its instructions on the question of exemplary damages. A mere willful and wrongful taking of property does not authorize a verdict for exemplary damages. Either malice, violence, oppression or wanton recklessness must mingle in the controversy. *Kennedy* v. *N. M. R. R. Co.*, 36 Mo. 351; *Honeseifer* v. *Shable*, 31 id. 243; *Freidenheit* v. *Edmondson*, 36 id. 226. When a party acts under the advice of counsel, it does away with the presumption of malice, and vindictive damages are not proper. Sedgw. on Dam. 460 (marg.); *Thompson* v. *Mussey*, 3 Greenl. 305; *Stone* v. *Swift*, 4 Pick. 393; *Blunt* v. *Little*, 3 Mason, 102; *Commonwealth* v. *Bradford*, 9 Metc. 268.

The only damages recoverable in this case would be the money taken with interest. Sedgw. on Dam. 550–553 (476 marg.). No special damages were claimed or proved.

The money taken was the property of Bohm & Aub. On the death of Aub the partnership was dissolved. The damages sworn to was the loss of the use of the money of the partnership to the partnership, which was not in existence. The administrator should have been made a party.

The rule "*actio personalis moritur cum persona*" is applicable. Broom's Leg. Max. 613; 1 Bouv. Law Dic. 64. In an action by personal representatives of a decedent, in respect of an injury to the personal estate of the decedent, the damages must be measured by the injury, and exemplary damages cannot be recovered. Sedgw. on Dam. 467 (marg).

E. W. & J. K. TOOLE, for respondent.

There is but one form of action for the enforcement of a right or redress of a wrong. Prac. Act, § 1. Distraint was the only remedy of the landlord at common law. He could not recover in debt or ejectment during tenancy, nor distrain for an uncertain demand. 1 Coke on Lit. 95, *a*; Taylor on L. & T. 564.

The statute gives new rights and remedies: forcible or unlawful detainer, assumpsit, contract and attachment. Taylor on L. & T. 525; *Renwick* v. *Morris*, 7 Hill, 575; *Stafford* v. *Ingersoll*, 3 Hill, 38. The appellants' demand was for so many dollars, and they took twenty-five per cent more than was due.

The authorities cited by appellant, as to proceedings under distress for rent, are under statute, and not common law. *Smith* v. *Stewart*, 6 Johns. 48. The relation of landlord and tenant must exist at the time of the distress. Notice to quit, suit for possession, appearance and judgment treats tenants as trespassers. 2 Coke on Lit. 144; Taylor on L. & T. §§ 488, 564, 565. At the time of the distress the tenant must be rightfully in possession and the landlord have a right to distrain. Respondent was a sub-tenant, had paid his rent and was not liable for rent. If liable to have property taken upon a distress, it should have been impounded. *Bain* v. *Clark*, 10 Johns. 424; 1 Smith's Lead. Cas. 219–221; 1 Coke on Lit. 152, 230; 2 Pars. on Cont. 481.

Appellants did not impound the money, but converted it to their own use and destroyed its identity.

We have adopted the common law of England applicable to this country. The right of distress for rent is inconsistent with the genius of our government and the rights and remedies afforded by law.

The sub-tenant never attorned to the landlord for rent and was not in arrears for rent. There is a difference between the right of a landlord to distrain for rent the property of persons not liable therefor found on the premises, and a conversion of that property by which claimant was deprived of his writ of replevin.

The right of action survives in this case. The action is not for damage to character, feelings or person, but a tortious trespass upon the property of respondents, who were partners. Barb. on Parties, 158, 167; Sedgw. on Dam. 372, 453, 548.

WARREN, C. J. This action is brought to recover damages for the wrongful taking and conversion by defendants of $1,935 in treasury notes of the United States and national bank notes, the property of the partnership firm of Bohm & Aub.

The joint answer of Dunphy, Bentley and Armitage, by pregnant negatives, admits the taking of the money, and as new matter justifies it as having been done under a distress warrant for rent due defendants, Dunphy and Bentley, under a lease from them to one Ames, of certain premises, upon which the money in question was found, and from which it was taken. A demurrer was interposed to this answer, which was overruled, and afterward a replication was filed by plaintiff Bohm. Aub, the other partner, having died after the commencement of the suit, and the cause proceeding by leave of the court in the name of the survivor. The cause was tried by jury, who found a general verdict for plaintiff for $3,397.25, upon which judgment was rendered against defendants Dunphy, Bentley and Armitage. Defendant Morse, who answered separately, not being included in the judgment. A motion for a new trial was made and overruled, from which order, and from the judgment, defendants appeal.

With the view we take of this case it will be necessary to notice but few of the errors assigned. Upon the authorities cited in the exhaustive brief of appellants and that of the respondent, we are of opinion that the common-law right of distress for rent conflicts with the spirit of the legislation of this Territory, and is inapplicable to our condition. The statutory remedies given to the landlord by attachment, and for detainer of leased premises, supersede the right of distraint for rent, which had its origin in the feudal relations,

and was the only means at common law to enforce payment of rent due. In all of the States in which the right is recognized in this country the legislatures have regulated the manner of its exercise and provided means for its execution, and the harshness and rigor incident to its origin have been mitigated. We have precedents in several States where, as here, the common law, so far as applicable, has been expressly adopted, for holding that the right of distraint for rent, even as modified by the acts of parliament cited by appellant in aid of it, is inconsistent with our institutions, and that it is peculiarly inapplicable here. Appellant claims that, inasmuch as the plaintiff did not abide his demurrer to the answer, but filed a replication, his demurrer was thereby waived, and the issue of law thereby raised cannot be reviewed on this appeal. This would be true if the answer was defective only in form or in such matter as could be cured by a verdict, but it is our duty, in reviewing the errors assigned on an appeal, to review the entire record in respect to the matter assigned as error. The answer here purports to make a full defense by way of confession and avoidance, no replication was necessary, and the matter in avoidance being insufficient in substance for that purpose, to that extent an immaterial issue was formed which was wholly incapable of being tried, and no ruling of the court, or verdict of a jury, could give it validity. Had the verdict been for defendants, the plaintiff was entitled to a judgment *non obstante veredicto.* All that remained under the pleadings was the question of damages, which might properly have been assessed by jury. We are of opinion that, upon assessment of the damages, the facts alleged in the answer might, perhaps, have been given in evidence as a partial defense in mitigation of damages, even if not pleaded at all, but certainly were proper for the consideration of the jury when pleaded for that purpose, although not good as a full defense to the action.

In reference, then, to the measure of damages, the only thing before the jury. The complaint does not allege spe-

cial damages and none were provable under it as such. The plaintiff could only recover such damages as directly and necessarily resulted from the act complained of, which would be the amount wrongfully taken, with legal interest for its detention, and such exemplary damages as the jury might give under proper instructions of the court, and within reason, under all the circumstances proven.

In this view all the instructions relative to the right and manner of distress are immaterial, except in so far as they might have misled the jury, which appellant does not claim.

The real error assigned, which is all we are to review, consists in the instructions upon the subject of exemplary damages. These are only given where the act complained of is willful, or there is either wanton recklessness or a deliberate intention to injure, and the court below erred in instructing the jury upon this subject that the fact that defendants acted under the advice of counsel could have no force. It is well settled that such fact, if in good faith, is proper for the consideration of the jury in connection with the question of exemplary damages, which have for their foundation the animus and circumstances attending the act. It appears from the evidence that the defendants in this case acted under the advice of an attorney whose recognized experience and abilities gave weight to his opinion upon a controverted question of law, which might well have commanded the confidence of defendants, and this fact should have gone to the jury for their consideration.

Regarding this action as prosecuted by Bohm as surviving partner to recover damages for the conversion of partnership property, we hold that it survived the death of Aub to the extent of such recovery, and that exemplary damages, being punitory in their nature, might also be recovered at the suit of the survivor, although matters personal in their nature to the deceased, which in his life-time might have been given in evidence in aggravation of damages, were improperly admitted.

For the errors in relation to the assessment of the damages contained in the instructions the cause is reversed and remanded for a new trial in accordance with the principles of this opinion.

Exceptions sustained.

BLACK, respondent, *v.* APPOLONIO et al., appellants.

PRACTICE — *continuance — diligence — affidavit and facts considered.* The refusal of the court below to grant a continuance will not be reviewed if there has not been a gross abuse of discretion. In determining what diligence has been used to obtain evidence, the court must consider not only the affidavit for a continuance, but facts within its judicial knowledge of the condition of the country and means of communication.

CASE AFFIRMED — *mechanic's lien.* The case of *Mason* v. *Germain*, *ante*, p. 263, deciding that the lien of a mechanic is not destroyed, if the court finds that the party has claimed, without fraud, more than he was entitled to, affirmed.

STATUTORY CONSTRUCTION — *law relating to mechanics' liens — remedial.* The act "securing liens to mechanics and others" should be strictly followed, but it is a remedial statute and should be liberally construed.

STATUTORY CONSTRUCTION — "*just and true account.*" Under the act "securing liens to mechanics and others," the words, "a just and true account," do not mean the exact account for which judgment may be entered, but an honest statement of the account by the party claiming the lien.

STATUTORY CONSTRUCTION — *mechanics' liens — implied contract.* Under the act "securing liens to mechanics and others" a mechanic is entitled to his lien for the payment of his services, which have been performed under an implied contract.

HOFFMAN *v.* WALTON DOUBTED. *Hoffman* v. *Walton*, 36 Mo. 613, gives too strict a construction to the statute securing liens to mechanics.

Appeal from the Third District, Lewis and Clarke County.

BLACK brought this action in May, 1870, to recover $719.50 and interest, and have the same decreed a lien on the "Walla Walla Hotel." The lien set forth in the complaint was as follows: "Know all men by these presents that, under an agreement with Joseph Appolonio, the owner of the premises (description omitted by reporter), the undersigned has performed labor and furnished materials in and

about (description): That said materials were furnished and labor performed (time omitted by reporter): That the amount due thereof, and for which the undersigned claims a lien, is the sum of seven hundred and nineteen $\frac{50}{100}$ dollars, over and above all payments and set-offs.

"I, the undersigned, Joseph Black, do hereby make known my intention to hold a lien upon the above described premises * * * for the said sum of $719\frac{50}{100}$ and interest thereon * * * ."

In the affidavit, Black swears that the foregoing notice "is true in all respects, and contains a just and true account of the demand due him, after deducting all proper credits and offsets."

Appolonio failed to appear and answer. The other defendants, Higgins, Hagadorn and Woolman, who had a mortgage on the premises from Appolonio, answered and denied all the material allegations of the complaint, and claimed that their mortgage was a prior lien to the pretended lien of Black.

In July, 1870, the cause was continued, on the application of Higgins, Hagadorn and Woolman, to procure the depositions of Appolonio and one Rafferty. In October, 1870, another application was made by the same defendants for a continuance to enable them to obtain the same depositions. The affidavit alleged that Rafferty and Appolonio were near Cedar creek, in Montana, about two hundred miles from Helena, and that the defendants had written letters and made inquiries to ascertain their whereabouts before the term commenced.

This motion for a continuance was overruled, and defendants excepted. The cause was then tried by the court, SYMES, J., who entered a judgment for Black for $719.50, and a decree for the sale of the premises to secure the payment of $600 of said judgment.

The motion for a new trial was overruled by the court, SYMES, J., and defendants, Higgins, Hagadorn and Woolman, appealed.

J. J. WILLIAMS and CHUMASERO & CHADWICK, for appellants.

The affidavits for a continuance showed a proper cause therefor. Civ. Prac. Act, § 158.

The respondent did not comply with the law securing liens to mechanics. He did not file with the county recorder a just and true account of his demand, after allowing all credits. Acts 1865, 333, § 6. This law is in derogation of the common law and must be strictly complied with by those who seek its benefits. It must be strictly construed Houck on Liens, § 70; *Brady* v. *Anderson*, 24 Ill. 112.

Respondent filed his notice of lien and account in gross. The bill of items, that was furnished to appellants after this suit was brought, showed that respondent included in his notice of lien the use of a shop and tools for some of the workmen. He can only have a lien for "work and labor done and performed upon or for materials, machinery and fixtures for building," etc. Acts 1865, 332, § 1. The account required to be filed must be confined to those specific items. Any thing beyond these is fraudulent and invalidates the whole claim for a lien. Houck on Liens, § 210.

If the account filed and proven is combined with other charges, for which no lien in given, so that it cannot be ascertained from the account filed how much of the gross charge is a lien, the whole benefit of the act is lost. *Edgar* v. *Salisbury*, 17 Mo. 271.

LAWRENCE & HEDGES, for respondent.

Appellants showed no diligence to obtain testimony of Appolonio and Rafferty. Their affidavit shows that they made arrangements with them to attend as witnesses, after the suit was commenced, and that Appolonio and Rafferty have not been beyond the reach of a subpœna. No subpœna was issued.

No exception was taken to the finding of the court below. Civ. Prac. Act, § 180. No objection was made to the introduction of the lien in evidence.

KNOWLES, J. This is an action to enforce a mechanic's lien against the Walla Walla Hotel, in the town of Helena, for work and labor done thereon in the erection of the same.

Judgment was given by the court below against Appolonio for $719, and a lien was awarded against the said property for the sum of $600.

The first error assigned is the refusal of the court below to grant a continuance on the affidavits filed and presented in the record.

The refusing or granting a continuance rests in the sound discretion of the court to whom the application is made. 11 Cal. 21; 23 id. 156.

This court cannot review this discretion, unless it was grossly abused. The court, as appears of record, upon the application of appellant, granted a continuance for one term for the purpose of allowing appellants to procure the testimony of the very witnesses named in this application. One of these witnesses, and the most important in the case, as appears by the decree, had been duly served with summons in this case, and had made default, and in law confessed the allegations of the complaint. A court, in passing upon a motion for continuance, is not confined to the statements in the affidavit, but can take into consideration those facts which are within his judicial knowledge concerning the condition of the country and the means of communication in determining whether due diligence has been used. Taking all these matters into consideration we can find no abuse of discretion.

The second point made by appellants is, that the lien should be set aside, for the reason that respondent claimed a lien for a greater amount than the court below found he was entitled to.

This court held, in the case of *Mason & Duke* v. *Germaine*, that a claim for a lien for a greater amount than a party shows himself entitled to would not vitiate the lien, if the same was unaccompanied by any fraud. This court cannot infer fraud from the facts presented in this record. The mere fact that an excess was claimed as a lien over

what the court found the respondent entitled to is not sufficient.

The case of *Edgar* v. *Salisbury*, 17 Mo. 271, is not in point. The question of fraud was not presented in that case. All that the court then decided was, that where it appears on the face of the pleadings that a party has claimed a lien for services for which the law gives no lien in the same notice for a lien for services for which the law does give a lien, and in the notice of lien an amount is claimed *in solido*, and no items specifying the amount due for each service on demurrer, the court will give judgment for defendant, for the reason that it cannot separate the amount, and tell what is a valid lien and what not.

It appears from the cases cited in Houck on Liens, that there is some conflict of opinion upon this point. While we are fully aware that the statute, giving mechanics and others liens, is in derogation of common law, and provides an extraordinary remedy, yet it is a remedial statute, and should be so construed as to further the object intended. Under our statute a mechanic can claim a lien for services under an implied contract. If the strict construction claimed is to prevail, then, should a mechanic fail to determine the exact amount a court or jury, under the testimony, might find his services to be reasonably worth, his lien would fail. It appears to us that all our statute requires is, that a person wishing to avail himself of the benefits of it should honestly state his account. The term, "just and true account," does not necessarily imply more than this. Neither does "a just or true account" imply, necessarily, the exact account a jury or court might find due under the contract. The case of *Hoffman et al.* v. *Walton et al.*, cited in Houck on Liens, as a case decided in Missouri, gives too strict a construction of a statute similar to ours. In the case of implied contracts it would make it useless, and afford no relief to those it was intended to protect. If a mechanic should make a mistake in addition, and claim one dollar more than he was entitled to, this would vitiate his lien. The definition of "just and true account," it decides,

in effect, to be an exact account. Considering the character of this statute, securing to mechanics and others liens, and the class of community intended to be protected by it, this construction of the statute may be said to stick in the bark. Houck on Liens says, "that in States where a lien is given on an implied contract, it would be doubtful whether so strict a construction would be given as in Missouri." We can see no difference in principle in the construction of the statute, whether the claim for a lien was on an express or implied contract. Such a statute should be strictly pursued, while it should be liberally construed.

The court below found no fraud on the part of the respondent.

Judgment of the court below affirmed.

Judgment affirmed.

TRAVIS et al., respondents, *v.* MCCORMICK, appellant.*

PRACTICE—*conflicting evidence.* The judgment of the court below will not be reversed if the evidence is conflicting.

MORTGAGEE—*personal property—issue of diligence.* It is a mixed question of law and fact to determine the issue respecting the use of due diligence by the mortgagee of personal property to obtain possession of the same.

MORTGAGEE—*diligence—possession of property.* The mortgagee of personal property, who makes no effort to obtain the possession thereof, within a month after the maturity of his debt, does not use the diligence that is required by law.

Appeal from the Third District, Lewis and Clarke County.

THE facts appear in the opinion and the report of the case at the January term, 1870 (*ante*, 148). The action was tried by the court, SYMES, J.

CHUMASERO & CHADWICK, for appellant.

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* Case affirmed. *Travis* v. *McCormick*, *ante*, 148, affirmed.

W. F. SANDERS and J. J. WILLIAMS, for respondents.

The only question presented is, the sufficiency of the diligence used by respondents to secure the possession of the mortgaged property. The statement that in Illinois a mortgagee should not delay one or two days is an illustration and not the assertion of a principle. Silence might sometimes be wiser diligence than many inquiries. Travel might sometimes not be diligence. No general rule can be established. The situation of the parties and the facilities of intercourse must be considered. *Reed* v. *Eames*, 19 Ill. 594; *Cass* v. *Perkins*, 23 Ill. 383.

If the facilities for finding the property were poor, and for hiding it absolutely good, if legal proceedings were of no probable avail, the length of time making due diligence would be modified. The court below found that due diligence had been used. Appellant asks that this finding of fact be reversed. Respondents claim that there should be a rehearing on the ruling in this case, at the January term, 1870.

SYMES, J. This was an action for the possession of personal property. The plaintiffs below claimed the possession of the horse in dispute, under a chattel mortgage executed to them by the vendors of defendant, who claimed the horse as an innocent purchaser after the debt the mortgage was executed to secure had become due, and contending that the plaintiff did not take possession of the horse or use due diligence to obtain possession after the debt became due.

The case was tried before the court below, and judgment rendered for plaintiffs. Motion for new trial overruled, and appeal taken from judgment and order refusing new trial.

The only question presented in the case is, did the respondent use such diligence as the law requires, or due diligence in endeavoring to obtain possession of the horse, when the condition of the mortgage became absolute. Section 3 of our chattel mortgage law provides that the property may remain in the possession of the mortgagor until the mortgage becomes due, if it is specified in the mortgage

This court decided in this case when brought here, on the order of the court below, sustaining a demurrer to the answer, that the property could remain with the mortgagor no longer than the time when the condition of the mortgage became absolute, and that the mortgagor must use due diligence to obtain possession of the property immediately after, and referred to decisions in the State of Illinois to sustain the position.

When there is a conflict of evidence, this court will presume the findings of the court below correct, and will not disturb the judgment, although it appears to be against the weight of evidence as shown in the statement.

But in this case the question of diligence is a mixed question of law and fact, and there being no conflict, but the case resting entirely on the testimony of the plaintiff, we must see if his testimony, as it appears in the statement on motion for new trial, constitutes, in law, such diligence as the mortgagor is bound to use as against innocent purchasers, after the mortgage becomes due, to obtain possession of the property.

Plaintiff, Travis, testified that when his book-keeper notified him the note was due, he inquired of several persons as to where the horse was; that he did not remember who any of them were; that the horse was somewhere about Helena; that he inquired of a man who had cattle on the Missouri river; did not recollect when the note became due; inquired of persons who knew mortgagor, and was informed he had gone to the Musselshell; supposed the horse was on the Missouri river, and inquired of a man living there; that this was all the search he made. Saw horse before the note became due, but not after, until I saw him in possession of defendant; never went out to make search; did not know how long after note became due before I made inquiry. The debt became due 1st of May, 1869, and the defendant purchased the horse about the 1st of July.

This evidence does not show due or legal diligence. The plaintiff testifies it might have been a month before he made

any inquiry, or any effort to get possession of the horse, after the debt became due; that he did not make any search for the horse, but inquired of persons, he did not remember who, etc.

The Illinois supreme court has decided, under a similar statute to ours, that neglect of one or two days to take possession after mortgage became absolute, when property was in same town, would defeat title as against an innocent purchaser.

If the evidence in the statement showed that plaintiff made inquiry as soon as practicable after the debt became due, and learned that the horse was at Musselshell, in the Indian country, not accessible with the mortgagor, it might be diligence to keep a look out for the property until it came within reach, and then take, or endeavor to take, the possession of it. The law only requires practicable and due diligence under all the circumstances surrounding the case. The evidence in the statement not showing this, the case is reversed and remanded for new trial.

Judgment reversed.

STORY et al., respondents, *v.* NOWLAN et al., appellants.

BANKRUPTCY—*preference to creditor*. In this case the court found that a firm had committed an act of bankruptcy by giving preference to a creditor.

Appeal from the Third District, Lewis and Clarke County.

THE facts appear in the opinion of the court and the dissenting opinion. The decree was rendered by SYMES, J.

CLAGETT & DIXON and E. W. TOOLE, for appellants.

The court erred in sustaining the demurrer to the amended answer, which set out an attachment issued and levied by

respondent, Story, for his debt after the filing of the petition. Such a proceeding on the part of a creditor violates the bankrupt act. § 39 of Act; *In re Princeton*, 1 Bankr. Reg. 178; *In re Coleman*, 2 id. 172. The demurrer admitted the truth of the allegation. The creditor was thereby debarred from proving his debt, and if he could not prove his debt, he could not maintain his petition.

The declarations of Stateler to different persons, concerning the drawing of money out of the bank of appellants by Stateler and others, were improperly admitted. Stateler was the agent of appellants in managing their business. Appellants were bound civilly by Stateler's acts and declarations as to matters within the scope of his authority, and no further. He could not commit an act of bankruptcy for appellants. 1 Greenl. Ev., §§ 113, 114; Story's Agency, §§ 134–136. As to authority of cashier of bank. Id., §§ 114, 115.

A general assignment for all creditors is not an act of bankruptcy. *Langley* v. *Perry*, 2 Bankr. Reg. 180; *Sedgwick* v. *Place*, 1 id. 204; 1 Am. Law Times, 44.

The evidence was insufficient to support the findings as to the preferred payments to Stateler, King, and Weir & Pope. The decree was based on these findings and facts. These payments were made by Stateler in the absence of appellants, and without their knowledge, consent or direction, and were never ratified or confirmed by them. Stateler had no authority to do these acts, and it was no part of his duty as their agent. A principal is never liable for the criminal acts of his agent unless specially authorized. 1 Pars. on Cont. 73; Story's Agency, § 456; *Vanderbilt* v. *Richmond T. Co.*, 2 N. Y. 479; *Clark* v. *Metropolitan Bank*, 3 Duer, 241.

Our bankrupt act in involuntary bankruptcy is in the nature of a penal statute and must be strictly construed. 3 Pars. on Cont. 429; Smith's Stat. Law, §§ 738, 746. All the grounds for involuntary bankruptcy involve fraud. § 39. Mere insolvency is not of itself ground for involuntary bankruptcy. *Dorn* v. *Compton*, 2 Bankr. Reg. 182.

The intent of the debtor determines the question of fraud within the meaning of the bankrupt act. An act is not

fraudulent unless it was meant to be so. *Langley* v. *Perry*, 2 Bankr. Reg. 180; Bump on Bankr. 128–132; James on Bankr. 153, 166–167.

The acts of Stateler were quasi criminal so far as they might be acts of bankruptcy. Appellants never authorized such acts and knew nothing of their commission and could not intend to give a preference, and hence could not commit an act of bankruptcy.

The evidence shows that respondent, Story, consented to the assignment, and the court erred in not finding this fact. He is thereby estopped from proceeding in bankruptcy, or denying the legality of the assignment. *In re Sunderland*, Law Times, 73; *In re Schuyler*, 2 Bankr. Reg. 169; *In re Whitmore*, Law Times, 105; *Ex parte Stray*, 1 Bankr. Reg. 18.

W. F. SANDERS and CHUMASERO & CHADWICK, for respondents.

The demurrer was properly overruled. *In re Schuyler*, 2 Bankr. Reg. 169.

The acts of respondent, Story, do not estop him from proceeding in this case. He endeavored to get the property of appellants into good hands, whence it would be forthcoming for distribution to pay creditors.

Stateler was a general agent about a particular business. His declarations, while properly engaged as agent, are admissible as part of the *res gestæ*.

Bankruptcy in modern days is not regarded as involving the turpitude it formerly did. The bankrupt law is no more penal or criminal than an attachment law, under which property is taken without the debtor's consent. Bankruptcy is a private tort. 1 Bish. Crim. Law, §§ 392, 405. Making preferred payments under the bankrupt act is not declared a crime or punished. 1 Lead. Crim. Cas. 241. The question as to Stateler binding his employers criminally does not arise in this case.

The payments were made to Weir & Pope, and King and Stateler by the express authority of appellants, or while

Stateler was acting in his principal's business. Appellants are liable therefor in either case. 1 Whart. Crim. Law, 154; 1 Bish. Crim. Law, 439, 440; *Rex* v. *Gutch*, Moody & M. 433; *Commonwealth* v. *Nichols*, 10 Metc. 259.

Stateler required no authority to pay depositors in the bank of his employers. 1 Am. Lead. Cas. 569. If an agent is instructed not to do certain acts within the scope of his general authority, but does the acts, the principals are bound thereby. *Dispatch L. Packets* v. *Bellamy M. Co.*, 12 N. H. 206, 223. The principal is held to the duty of employing agents that will obey instructions. Appellants never disavowed the acts of Stateler in making the preferred payments. They made no effort to get back the money that their agent paid to preferred creditors.

WARREN, C. J. The giving of preference to their creditor Stateler, to the amount of $30,000, is one of the acts of bankruptcy found by the judge of the district court. This was the fact sought to be established by the evidence preserved in the record, and, in determining it, all the evidence concerning it should be considered together, and, so considering it, I am compelled to the conclusion that the finding of the judge in this particular is supported by the evidence. It is unnecessary to review the other findings. The findings and adjudication of the judge of the district court are affirmed.

Judgment affirmed.

KNOWLES, J., dissenting. This proceeding is brought to this court on a petition for a review of the adjudication by the Hon. G. G. SYMES, Associate Justice of this court, made while holding the district court for the third judicial district, declaring Nowlan and Weary bankrupts.

The petition of Story and Bradway, filed herein, makes various allegations of acts of bankruptcy committed by Nowlan and Weary. The answer of Nowlan and Weary puts in issue these allegations. It confesses an assignment of all their property to one Thompson, and from him to

one Corbin, for the benefit of all their creditors, and avers that the same was done with the consent of petitioners, while it denies that the same was done with the intent to hinder, delay or defraud their creditors or to defeat the operation of the bankrupt act. To constitute this general assignment an act of bankruptcy, it must have been done with one of these intents. In support of this, see the reported decision of Justice SWAYNE, in *Langly* v. *Perry*, 2 Bankr. Reg. 180, and *Thos. Farrin* v. *John Crawford et al.*, id. 181. These intents are facts to be established by the evidence, and cannot be inferred from the mere fact of such an asssignment. I am well aware that there is a decision adverse to this view, namely, *Langly* v. *Perry*, 1 Bankr. Reg. 155, but this decision is evidently the very one which Justice SWAYNE reversed in the same entitled case above referred to. This issue cannot be treated then as though it was admitted, and made the foundation for the above adjudication. When a court below finds that a defendant has committed certain specific acts of bankruptcy, upon which it evidently based its adjudication, and which, if correctly found, were sufficient to warrant the adjudication, it will not be presumed by this court that it found other acts than those specified, although there were issues presented in the pleadings upon such other acts. Only those acts then are to be considered that are specified in the findings of the court. If the evidence did not warrant the court in finding that Nowlan and Weary had committed these acts, the judgment of the court below must be reversed.

The first finding of the judge was to the effect that Nowlan and Weary had committed an act of bankruptcy in paying to their clerk, Stateler, something near $30,000, with the intent to give him a preference. The evidence shows that Nowlan and Weary were indebted to Stateler in about this amount; that he was the cashier, book-keeper and teller of their bank at Helena; that at the time of this payment neither Nowlan or Weary were present, Weary being at Virginia city, and Nowlan at the Cable mine; the former one hundred and twenty miles distant, the latter some

eighty miles. The only evidence offered to prove that either of these partners had directly authorized this payment was the testimony of one Dunovan. He testified that he was present when Stateler paid himself out of the funds in the bank, and that at that time Stateler told him that he had an understanding or agreement with Nowlan and Weary, that in case of a crash he should draw out sufficient to pay what they owed him. Counsel for defendants objected to this testimony of Dunovan, which objection was overruled, and to this ruling defendants' counsel duly excepted. It is contended by counsel for petitioners that this declaration of Stateler was part of the *res gestæ* of Stateler taking this money in payment of himself. The *res gestæ* of a transaction is something that was said or occurred at the time a transaction was being conducted, and may be introduced in evidence, when the same is the subject of controversy, to explain or throw light upon it, but the *res gestæ* of one transaction cannot be introduced for the purpose of explaining or throwing light upon another. As to another transaction, it is hearsay, unless the parties to be affected by the same were present and acquiesced therein. This evidence could not be introduced as part of the *res gestæ* of any agreement between Stateler and Nowlan and Weary to explain or throw light upon the same. In considering whether or not Stateler was authorized by Nowlan and Weary to make this payment to himself, the point to be considered is, whether or not there was the agreement named by Dunovan. For the purpose of establishing or explaining any such agreement, the declarations of Stateler, so far as they affected Nowlan and Weary, were clearly incompetent. What other evidence was there presented to the judge to warrant him in finding that Nowlan and Weary had ever made such an agreement with Stateler? None, save that Stateler was retained in the employ of Nowlan and Weary, after the time the judge found them insolvent, when he had it in his power to make himself a preferred creditor. Such evidence is not sufficient to warrant the finding of such an agreement, although it may

be a strong ground of suspicion that such was the case. A judge, however, cannot act upon suspicions. For these reasons I do not think the court below was warranted in finding any such agreement. The other point involved in the discussion of this finding is, as to whether the authority given to Stateler, as cashier, book-keeper and teller of the bank of Nowlan and Weary, was sufficient to authorize him to make a payment to himself, with the intent to give himself a preference. This point is involved in the determination of the other two findings of the judge, before whom the cause was heard, and will be discussed in connection with them.

The second finding was, that Nowlan and Weary had made a payment to one King, with the intent to give him a preference; and the third, that they had made a payment to Messrs. Wier & Pope, with the intent of giving them a preference.

The evidence shows that Stateler went to King, and also to Wier & Pope, and told them that there was about to be trouble at the bank and that they had better come and draw out what money they had therein, which they accordingly did. Undoubtedly if Nowlan and Weary are bound by these acts of Stateler, the court was warranted in adjudicating them bankrupts, for it is evident Stateler intended to give these persons a preference. It is not contended that Nowlan and Weary ever gave Stateler any direct authority to perform these acts, or ever ratified them afterward. It does not appear that up to the time of this trial Nowlan and Weary had any knowledge of the manner in which these payments were made. Neither of them were at Helena at the time the same were made. This brings us to the consideration of the authority possessed by Stateler, as book-keeper, cashier and teller of appellants' bank. In general, it may be said, that the law presumes that an agent has all the authority necessary for conducting the business intrusted to him, and unless some notice is given to the person dealing with such agent of a limitation in this authority, the principal will be estopped from denying it in any contest be-

tween him and such person, where the latter will be subjected to any loss if the former was permitted to deny this authority. Was the business intrusted to Stateler of such a nature as to authorize him to commit the acts of bankruptcy specified in the findings of the court? Stateler had authority undoubtedly to pay all checks that were presented to that bank in the due course of business. Such payments as these, however, do not constitute acts of bankruptcy. If so, then the payment of any check by a bank, or any sum by any person, being at the time insolvent, would be an act of bankruptcy. Payments to constitute acts of bankruptcy must be made with the intent of giving a preference, or in other words, the payments must be such as amount to an attempt by the person making them to parcel out his effects among certain of his creditors, leaving the debts of the balance unprovided for. They are payments made for the purpose of defeating one of the principal objects of the bankrupt act, namely, the general distribution of the assets of a bankrupt among all his creditors. Now, such payments as these are not within the usual scope of the business of a banking-house. Such payments are prohibited by law since the passage of the bankrupt act, and it will not be implied that an agent has the authority to violate the provisions of law. It was not then within the scope of the business of Stateler to make payments with the intent to give a preference to the parties named. Hilliard on Bankruptcy lays down this rule: One cannot commit an act of bankruptcy by the conduct of his agent unknown to him. See Hill. on Bankr. 24. In looking over the list of acts that constitute a man a bankrupt, it will be readily seen that it would be impossible to bind a principal by such acts of his agent without specific authority. It will be observed that many of the acts which make a man liable to be adjudged a bankrupt involve some wrong intent. To make a principal liable for the intent with which his agent may do any act, it appears to me would be holding him to too strict a liability. In general, I should say, that a court in bankruptcy could only inquire as to the in

tent of the principal in authorizing his agent to perform the act complained of, and that the intent of the agent could in no way be considered. It may be observed upon this point, that the same rule should not prevail in bankruptcy as where a principal contracts through an agent. In the latter case the principal is bound by the apparent authority of his agent. In the former he should be bound only by the actual authority given his agent. The reason for the rules in estoppel should not apply in bankruptcy upon this subject.

It does not appear that Story actually obtained any preference by means of his attachment process. From the answer of defendants I understand the law to be that a party is prohibited only from proving his debt when he has actually obtained a fraudulent preference. It may also be doubted whether the defendants could raise this point, for if Story and Bradway actually have obtained a fraudulent preference, Nowlan and Weary must have suffered it, and hence do not possess clean hands themselves, and courts of equity will not allow parties to set up as a defense a fraud which they have participated in. The denial of the right to prove a claim by a person who has obtained a fraudulent preference is a matter that the other creditors can take advantage of after the adjudication of bankruptcy.

The court below did not find upon the issue as to whether Story and Bradway had consented to the assignment of Nowlan and Weary to Thompson, and from Thompson to Corbin, nor upon the issue as to whether this assignment was made with the intent of defeating the operation of the bankrupt act. This court will not determine these issues.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1871, HELD AT VIRGINIA CITY.

Present:

HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. JOHN L. MURPHY, }

TERRITORY OF MONTANA, respondent, *v.* WHITCOMB et al., appellants.

CRIMINAL LAW—*fornication*. Fornication is the carnal and unlawful intercourse of an unmarried person with the opposite sex.

CRIMINAL LAW—*adultery*. Adultery is the unlawful sexual intercourse, or open and unlawful living together of a man and woman, when one or both of them are married.

CRIMINAL LAW—*evidence of fornication—unmarried*. A party, who has been indicted for the crime of fornication, cannot be convicted unless it is alleged and proved that he was unmarried at the time specified in the indictment.

JURY—*private knowledge of facts—verdict*. A juryman must render his verdict according to the testimony legally produced in open court at the trial, and disregard his private knowledge or belief.

Appeal from the Third District, Lewis and Clarke County.

WHITCOMB was tried by a jury in March, 1871, before WARREN, J., and found guilty under an indictment drawn upon the following statute: "Any man and woman who shall live together in an open state of adultery or fornication, shall be indicted, and, on conviction, shall be fined in any sum * * * or imprisoned" * * * . Crim. Prac. Act, § 127; Acts 1865, 208.

The facts are stated in the opinion.

W. F. SANDERS and LAWRENCE & HEDGES, for appellant.

Only one day is named in the indictment as the day of the commission of the offense. No single instance of fornication would support the indictment. 2 Bish. on Crim. Law, §§ 26, 28; *Commonwealth* v. *Tubbs*, 1 Cush. 2. A living together one day in an open state of fornication would not complete the offense charged in the indictment. The prosecution having selected a certain day, must confine the evidence to that date. *Commonwealth* v. *Wood*, 4 Gray, 13.

The offense charged is made up of a series of acts. Evidence was admitted tending to show that defendant was guilty on other days than that specified. Time enters into the essence of this offense and fixes its identity. *Commonwealth* v. *Adams*, 4 Gray, 27; *Commonwealth* v. *Pray*, 13 Pick. 364; *Commonwealth* v. *Briggs*, 11 Metc. 573; *Commonwealth* v. *Elwell*, 1 Gray, 463; *Commonwealth* v. *Perley*, 2 Cush. 559; Roscoe on Crim. Ev. 84. How can appellant defend himself by this judgment on his plea of former conviction?

The instructions of the court respecting the proof of the unmarried condition of appellant were erroneous. The jury were allowed to form their opinion on material facts without evidence.

J. A. JOHNSTON, District Attorney, Third District, and J. H. SHOBER, for respondent.

The offense charged may be charged as committed on a

day named. No continuando is necessary. The living together, as set forth in the indictment, was a question of fact for the jury. 2 Bish. on Crim. Pr., §§ 24, 29; *Hinson* v. *State*, 7 Mo. 244.

WADE, C. J. This case is here upon appeal from the judgment and verdict in the court below, and from the order overruling a motion for a new trial.

This is an indictment for fornication, drawn upon the one hundred and twenty-seventh section of the "Act concerning crimes and punishments," Statutes 1865, p. 209, wherein it is alleged that on the 20th day of January, 1869, at the county of Lewis and Clarke, the defendants Edward Whitcomb and Catharine Durgen did then and there unlawfully live together in an open state of fornication, the said Whitcomb being then and there a single and unmarried man, and the said Durgen being then and there a single and unmarried woman.

This was the separate trial of the defendant Whitcomb. Among the errors complained of, as shown by the record, are the following:

1. The refusal of the court to give the following instruction to the jury, asked for on behalf of the defendant: "The jury are instructed that it devolves upon the prosecution to prove every material allegation necessary to constitute the crime charged; that it is a material point to prove that the parties charged were not intermarried; and that, in the absence of any testimony upon that point, the jury cannot presume that the defendants were associating unlawfully."

2. The giving of the following instruction to the jury, asked for by the prosecution: "That it devolves upon the prosecution to prove every material allegation necessary to constitute the crime charged; that it is a material point that the jury should believe that the parties charged were not intermarried, and, if there is a reasonable doubt upon that point, the jury cannot presume that the defendants were associating unlawfully, in case there is evidence sufficient

to raise a reasonable doubt in the mind of the jury upon that point."

It was necessary to aver in the indictment, and to prove upon the trial, that the defendant was single and unmarried; for the meaning of the term "fornication" is the carnal and illicit intercourse of an unmarried person with the opposite sex. It is impossible for a married man and a married woman to commit fornication. Unlawful sexual intercourse, and open and unlawful living together of a married man and married woman, or where either are married, and thus have intercourse or live together, is adultery; and the same state of facts existing between unmarried persons, man and woman, is fornication.

We have carefully examined the record of evidence and testimony in this case, and we find that, upon the trial of this case, there was no testimony offered or received, showing, or tending to show, that these defendants were not married at the time the crime is alleged to have been committed.

If they were living together in an open and notorious manner, it would be but a reasonable presumption to presume that they were so living lawfully and as they had a right to do, and, in the absence of any proof to show that they were unmarried, a conviction for fornication ought to be impossible. Even the married condition of either of the parties would change the nature of the crime, so that the married or unmarried condition of these defendants, or either of them, was a most material inquiry upon the trial, and the absence of any proof upon the subject renders a conviction legally impossible.

The foregoing instruction asked for and given, on behalf of the prosecution, is inherently wrong. It will be observed that it authorizes the jury to form an opinion as to the married or unmarried condition of these defendants, from their own knowledge and belief, in the absence of any testimony on the subject.

It is an old and familiar doctrine that juries must have or form no belief, except what they believe from the testi-

mony produced before them at the trial. Any other rule would destroy this guardian of our rights and liberties — the trial by jury. The jury must believe from the testimony, legally produced before them in open court, and from that alone; and any instruction of the court that permits the private belief or private knowledge of a juryman to sway his findings or his judgment is wrong and beyond remedy.

The judgment of the court below is set aside, and a new trial granted.

Exceptions sustained.

SIMONTON, respondent, *v.* KELLY et al., appellants.

PRACTICE — *taking of exceptions — presumption of time and manner.* This court will presume that exceptions were taken at the proper time, and in the proper manner, if the record shows that a party "duly excepted" to the refusal of the court below to give instructions.

PRACTICE — *general exception not regarded.* A general exception which does not point out the particular error complained of will be disregarded if a part of the instructions is correct.

EVIDENCE — *proof of special contract.* A party who brings an action upon a special contract cannot recover, if he does not establish the contract, as alleged in his complaint, and prove that he has complied with its terms.

Appeal from the Third District, Lewis and Clarke County.

SIMONTON brought this action in April, 1870, to recover $950, and interest, and have a decree for the sale of certain premises. The case was tried in April, 1870, in the district court, SYMES, J., and the jury returned a verdict for Simonton. The facts are stated in the opinion.

E. W. & J. K. TOOLE, for appellants.

The evidence and verdict show that respondent did not perform the conditions of the contract on his part. The court instructed the jury to find upon a *quantum meruit.*

This was error. The court refused to instruct the jury that they could not find for respondent, except they found a contract as charged. A party cannot sue upon a special contract, and recover upon a *quantum meruit.*

CHUMASERO & CHADWICK, for respondent.

No exceptions are saved to the instructions except a general one to all. This court cannot notice such exceptions. The errors assigned in appellant's brief are not set forth in his motion for a new trial, and cannot be assigned for the first time in this court.

The question at issue related to the contract between the parties as stated in the complaint. The evidence was conflicting, but the jury determined the issue in favor of respondent.

KNOWLES, J. This is an action to foreclose a mechanic's lien. The fact as to the amount due the plaintiff was submitted to a jury.

The complaint contains the following averment: "Plaintiff alleges that from the 20th day of June, A. D. 1869, to the 15th day of August, at the special instance and request of the said defendant Henrietta Kelly, and by virtue of an agreement and contract made with her, this plaintiff furnished materials and performed labor, which said agreement amounted to the sum of $1,500, and was reasonably worth said amount."

From this averment there might be some doubt whether the plaintiff intended to declare on a special contract or on a *quantum meruit.* The defendant, in her answer, puts in issue this allegation as though it was an averment on a special contract. The only testimony offered by the plaintiff upon this issue is as follows:

"I agreed with her to furnish all the carpenter work, painting and glazing for her building for the sum of $1,500. She agreed to this, and it was further agreed that she should pay this by the 15th of August, 1869, and, if she failed to pay at this time, then was to pay interest thereon."

This was evidence given by the plaintiff himself. No evidence whatever was introduced to show the reasonable value of the labor and materials furnished. The second instruction given by the court reads as follows:

"This is an action to prove an express contract for labor and materials furnished by plaintiff to the defendants, and if the jury find, from the evidence, that plaintiff has complied with his contract, he is entitled to recover the contract price for such labor and materials furnished, deducting any payment."

Taking the allegations of the complaint and answer, together with the evidence and this instruction, and the conclusion is inevitable that this was treated as an action on a special contract.

The defendants offered the following instructions, which were refused:

1. "If the jury believe, from the evidence, that the plaintiff made a special contract with defendant Henrietta Kelly to do the carpenter work upon her building, and that plaintiff failed to perform said work according to the terms of his contract, then they will find for the defendant."

2. "If the jury believe, from the evidence, that there was no special contract between plaintiff and defendant, Henrietta Kelly, they will find for defendant."

3. "If the jury believe, from the evidence, that the plaintiff agreed to do the defendant a good job in a good workmanlike manner, and that the job done is not a good job, or done in a good workmanlike manner, they will find for the defendant."

4. "If the jury believe, from the evidence, that there was a contract between the plaintiff and defendant, Henrietta Kelly, but that plaintiff failed to carry out said contract according to its terms, then he cannot recover from defendant upon such contract."

"Refused. Others given upon this point."

To the refusal of the court to give these instructions the record shows that the defendant, by her counsel, "duly excepted." When the record, as in this case, shows that the

rulings of the court were duly excepted to, this court must presume that the exceptions were taken at the proper time and in the proper manner. The objection urged by respondents that this exception is too general, is not well taken, for even if this is a general exception then the question presented to us to determine is, was the ruling of the court in refusing any of these instructions proper? If every one of these instructions should have been given, then the exception is sufficient. Courts will disregard a general exception only when it does not point out the specific error complained of, and it appears that a part of the instructions given were good. We hold that these four instructions should have been given, and the exception covers these four instructions and these only.

The record does not show that any other instruction covering the point presented in instruction four was given by the court.

The defendant introduced evidence to show that the plaintiff failed to comply with the contract to which he had testified, that the work was not done in a good and workmanlike manner, and that no express contract had ever been entered into between plaintiff and defendant, and these issues were presented by the answer.

It is a well-established principle that a party must stand by the case he has made out for himself in his pleadings and proof. If a party sets forth a special contract in his complaint, he cannot recover unless he establishes by the proof this contract, and it is error in a court to refuse to instruct a jury if he fails to establish by the proof the contract he has alleged he cannot recover. So if a party sues upon a special contract and it appears from the testimony that he has failed in a material part to perform this contract on his part, he cannot recover thereon, and it was error to refuse to instruct the jury in this case to this effect. These four instructions asked for on the part of the plaintiff were directed to these two points. They were proper issues in the case, and testimony had been given upon them.

It was error in the court to refuse to give them, and one that it will be presumed materially affected the rights of the defendant.

Judgment of the court below reversed and cause remanded.

Exceptions sustained.

This case was before the court at the August term, 1872 (see page 483).

PINNEY, respondent, *v.* HERSHFIELD et al., appellants.

PRACTICE — *statement — specific errors.* A statement on a motion for a new trial is sufficient if it points out in an intelligent manner the specific errors relied on by the appellant.

PLEADING — *complaint on attachment bond — allegation — damages.* In an action against the sureties on an attachment undertaking to recover the damages caused by the wrongful suing out of the attachment writ, the complaint must allege that the principal has not paid the damages.

ATTACHMENT UNDERTAKING — *contract of sureties.* The contract of the sureties in an attachment undertaking is in the nature of a guaranty that the principal will pay the costs and damages sustained.

Appeal from the Third District, Lewis and Clarke County.

PINNEY commenced this action in September, 1869. The cause was tried in March, 1870, by a jury, that returned a verdict for Pinney for $1,300. The court, SYMES, J., overruled the motion for a new trial.

The facts appear in the opinion.

W. F. SANDERS, for appellant.

The complaint should allege a breach of the undertaking, that Whitlatch did not pay the damages. 1 Chitty's Pl. 332; *Hayden* v. *Sample*, 10 Mo. 215; 2 Sanders' Pl. 181; *Love* v. *Redwell*, 4 Blackf. 553; *Fletcher* v. *Peck*, 6 Cranch, 127; *Hughes* v. *Smith*, 5 Johns. 168; *Smith* v. *Jansen*, 8 id. 111; *Potter* v. *Bacon*, 2 Wend. 583; *Jullian* v. *Burgott*, 11 Johns. 6.

There is no allegation of damages that would enable respondent to introduce proof. Appellants agreed that, on the happening of a contingency, Whitlatch would pay damages sustained by reason of the attachment. The court extended appellants' liability to pay respondent his costs, trouble and expense in defending against the suit. Appellants never assumed this liability. In these respects the complaint was fatally defective. Stephen's Pl. 146; *Kent* v. *Snyder*, 30 Cal. 666; *Green* v. *Palmer*, 15 id. 411; *Abbe* v. *Marr*, 14 id. 210.

The contract of a surety is favorably regarded in law. The words used in his agreement are not to be extended beyond their clear import.

The following authorities were referred to and cases therein cited: Sedgw. on Dam. 453, 465; 1 Estee's Pl. 237; 1 Hill. on Torts, 422.

H. L. WARREN and W. E. CULLEN, for respondent.

The statement on the motion for a new trial does not specify the particular errors relied on, as required by the statute, and must be disregarded. Civ. Prac. Act, § 195; *Harper* v. *Minor*, 27 Cal. 109; *Barret* v. *Tewksbury*, 15 id. 356; *Zenith G. & S. M. Co.* v. *Irvine*, 32 id. 302; *Love* v. *Sierra N. L. W. & M. Co.*, id. 639; *Beans* v. *Emanuelli*, 36 id. 121; *Caldwell* v. *Greeley*, 5 Nev. 260.

All that remains for review are the pleadings, verdict and judgment.

No appeal lies from an order overruling a demurrer. 3 Estee's Pl. 647; *Ford* v. *David*, 13 How. Pr. 193; *Young* v. *Grundy*, 6 Cranch, 51; *St. Paul Division* v. *Brown*, 9 Minn. 151.

Appellants' authorities are not applicable. They refer to common-law actions on bonds for a penalty with conditions, breaches of which must be assigned in the declaration. This action is upon a statutory undertaking, executed in pursuance of the civil practice act, which is peculiar in form. Civ. Prac. Act, § 122.

Whitlatch should have been principal in the undertaking,

and appellants cannot take advantage of his failure to execute it, and are estopped from denying its sufficiency. The undertaking is, that "if the defendant recover judgment, the plaintiff will pay," etc. The complaint alleges that defendant "recovered judgment" in the action in which the undertaking was given. The undertaking to pay costs and damages then became absolute upon appellants. The averment of indebtedness was made in the complaint, and there is no presumption of payment which it is necessary to negative. Payment must be pleaded and proven in defense. 2 Whit. Prac. 114.

KNOWLES, J. This is an action on an attachment undertaking, to recover damages occasioned the plaintiff on account of the wrongful suing out of said writ. It appears that the appellants appeal to this court from the order overruling the motion for a new trial, and from the judgment of the court below.

The respondent urges that there is not such a specification of errors in the statement on a motion for a new trial as will justify this court in considering it.

The statutes of this Territory provide that a statement "shall state specifically the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified and no more." See Stat. of 1867, p. 199.

We do not propose to lay down any rules which shall prescribe the manner in which these errors or grounds, upon which the appellant will rely for a reversal, must appear. So that they are pointed out specifically, in some intelligible manner, is all that we require. The statement, however, under consideration we do not think does this, and, hence, hold that we cannot consider the same. The appeal from the judgment brings to this court the judgment roll.

The undertaking, upon which this action was brought, reads as follows:

"Know all men by these presents: That we, , as sureties for James W. Whitlatch, do undertake in the sum of five thousand four hundred dollars, that if the defendant in the action of James W. Whitlatch against George M. Pinney, this day commenced in the district court, third judicial district of the Territory of Montana, sitting in and for Lewis and Clarke county, shall recover judgment, that the said Whitlatch will pay all costs that may be awarded said Pinney, and all damages which he may sustain by reason of the attachment in said action, not exceeding the sum aforesaid.

"Witness our hands and seals this day of June, 1869.

"L. H. HERSHFIELD. [L. S.]

"ALEX. H. BEATTIE." [L. S.]

The complaint in this action does not state that the said Whitlatch had not paid, or refused to pay, the costs and damages sustained by the plaintiff.

The appellants demurred to this complaint for this reason, assigning that the complaint did not state facts sufficient to constitute a cause of action. Undoubtedly the appellants, in this contract, made themselves liable to pay the costs and damages sustained by the respondent, in case the said Whitlatch did not. Their contract is in the nature of a guaranty. They do not undertake that they will pay all costs and damages, sustained by respondent, themselves, but that Whitlatch will pay them.

A demand on the principal debtor, and a failure on his part to do that which he is bound to do, are requisite to found any claim against the guarantor. 2 Pars. on Cont. 29.

In the case of *Tarpey* v. *Shillenberger et al.*, 10 Cal. 390, BALDWIN, J., says: "The condition of the undertaking is, that the plaintiffs in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiffs by virtue of the issuing of said injunction by any competent court. No sufficient breach is averred, since it is not alleged that any damages were so awarded. The sureties are entitled to stand on the

precise terms of the contract, and we know of no way of extending their liability beyond the stipulation to which they have bound themselves."

This case shows that the complaint must allege sufficient to manifest that the condition upon which parties to an undertaking were to become liable has transpired. We can see no difference between this, where parties were to become responsible in the event that their principal did not perform his obligation, and in the case where persons were to become liable on the condition that another person did not perform his duty as an officer. In such a case the authorities are abundant, to the effect that the complaint must show that the officer has not performed his duty. This failure is the breach of their contract, and must be alleged.

We hold, therefore, that it was necessary for the respondent to have alleged, in his complaint, that the said Whitlatch had not paid said damages; and, hence, the court below erred in overruling the demurrer of appellants.

For these reasons the judgment of the court below is reversed, and the cause remanded.

Exceptions sustained.

TERRITORY ex rel. LARGEY, appellant, *v.* GILBERT, respondent.

STATUTORY CONSTRUCTION — *act relating to interest on county warrants — indorsement of.* Under the statute entitled "An act authorizing county commissioners to pay interest on county warrants," approved February 8, 1865, the duty of making the indorsement, "not paid for want of funds in the treasury," on the warrant, devolves on the county treasurer; and the court, by a writ of mandate, can compel him to make this indorsement at the time the party was entitled thereto.

INTEREST ON COUNTY WARRANTS — *no indorsement by treasurer.* The neglect of the county treasurer to properly indorse a county warrant that has been duly presented to him for payment, does not release the county from its

liability to pay the interest authorized by the statute, and the court will regard the indorsement as made, because it should have been made.

EQUITY — *maxim applied — mandamus.* An application for a writ of mandate is an equitable proceeding; and the maxim in equity that "equity looks upon that as done which ought to have been done," is applicable to this case.

STATUTORY CONSTRUCTION — "*not paid for want of funds.*" It was the intention of the legislature that the indorsement "not paid for want of funds in the treasury," should show that the county warrant had been presented for payment at a certain time, and that payment had been refused for want of funds in the treasury; it was not intended to be an arbitrary condition provided for the sole purpose of making county warrants draw interest.

STATUTORY CONSTRUCTION — *act relating to payment of county warrants — act repealed.* The act entitled, "An act defining the duties of county treasurers, and the payment of county warrants," approved November 19, 1867, provides for the preservation of the order in which county warrants have been presented for payment, and repeals the act entitled "An act authorizing county commissioners to pay interest on county warrants," approved February 8, 1865, which provides for a different means of preserving such order.

Appeal from the First District, Madison County.

JUDGMENT was rendered in this case in April, 1871, by MURPHY, J. The warrant that was the subject of the action was bought by Largey, February 16, 1869. The other facts appear in the opinion.

Section 2 of the act, approved November 19, 1867, is as follows: "It shall be the duty of the several county treasurers within the Territory, to keep a book in which they shall enter all county warrants of their proper county presented for payment, in the order in which they are presented, giving the name of the owner, the number and amount of the warrants, and they shall be paid in the order in which they are presented."

H. L. WARREN, for appellant.

The demurrer confesses the allegations of the complaint. The payment of the warrant was a ministerial act, to compel which mandamus was the proper remedy. Acts, 1865, 517, § 6; Moses on Mandamus, 99; *Crandall* v. *Amador County*, 20 Cal. 75; *Dana* v. *San Francisco*, 19 id. 486.

The statutes relating to the payment of the warrant were as follows; Act Feb. 8, 1865, 447; Act Nov. 19, 1867, 59;

Act Jan. 14, 1869, 85. These statutes are to be construed together. Smith on Stat. Law, 752.

The provision of the act of 1865, as to the indorsement of words on order, not being of the essence of the thing to be done, is directory and not mandatory. Smith on Stat. Law, 792.

The direction to indorse the words is to the respondent, and, if he fails to comply, he cannot take advantage of his own wrong, to the injury of appellant, by refusing to pay the interest for that reason. The warrant was, in both instances, presented to the treasurer for payment, and, in default of such payment, bore interest under the act of 1865. Under the act of 1865, interest ran from date of presentation and failure to pay; under the act of 1867, the warrant was payable, with the interest, in the order of registration. The two acts do not conflict, and are to be construed together.

H. N. BLAKE, district attorney, first district, for respondent.

The writ of mandate cannot issue, in this case, if respondent is not required to perform an act which the law specially enjoins as a duty resulting from his office. Civ. Prac. Act, §§ 442, 443; *People* v. *Romero*, 18 Cal. 91; *Crandall* v. *Amador County*, 20 id. 75.

Respondent's duty is defined by law. Acts 1865, 517, 518, §§ 6, 7. He cannot pay out county moneys, except when "specified provision" is made therefor by law.

The only law allowing interest on county warrants is the act of February 8, 1865, p. 447. Full force is to be given to every word thereof. The intention is clear. *San Francisco* v. *Hazen*, 5 Cal. 171.

The law, being in derogation of the common law, must be construed strictly. Appellant cannot recover interest without the indorsement "not paid," etc. *Raun* v. *Reynolds*, 11 Cal. 19; *Beals* v. *Supervisors*, 28 id. 453–455.

The importance of this indorsement is established by decisions in California under a similar statute. *Taylor* v.

Brooks, 5 Cal. 332; *McDonald* v. *Bird*, 18 id. 195; *Dana* v. *San Francisco*, 19 id. 486; *Beals* v. *Supervisors*, 28 id. 453; *Rose* v. *Estudillo*, 39 id. 273.

The transfer of the warrant from Davis to Largey gave Largey no rights not possessed by Davis. *Ferris* v. *Coover*, 11 Cal. 175.

No charge of neglect is made against the first treasurer by Largey. If he refused to indorse the warrant a writ of mandate would compel him to do so. The law presumes that all officers do their duty. *Egery* v. *Buchanan*, 5 Cal. 56.

The first treasurer indorsed the warrant under the act of November 19, 1867. Acts 1867, 59. Gilbert cannot be sued if another treasurer had neglected his duty.

KNOWLES, J. This is an action of mandamus against the respondent, Dezell Gilbert, as county treasurer of Madison county, to compel him to pay interest on a certain county warrant of said county, which it is alleged he has refused to do.

It appears from the complaint that the appellant is now the owner of county warrant of Madison county No. 1560, dated August 5, 1868, for $400. That on the 6th day of said August, the same was presented to one A. S. Potter, then treasurer of said Madison county, and not paid by him for want of funds in said county treasury. That on the day of said presentment for payment, the said Potter made an entry in a book kept by law in said treasurer's office of the name of the then owner of said warrant, the number and amount thereof, and indorsed thereon, "registered August 6, 1868, A. S. Potter, County Treasurer." It appears further, that sufficient money had come into the hands of the said Gilbert, as county treasurer, to pay said warrant and interest thereon, but that the said Gilbert had only paid the principal of said warrant, and refused the payment of any interest. The respondents filed a general demurrer to said complaint, assigning that the same did not state facts sufficient to constitute a cause of action. Re-

spondents claim that the complaint is radically defective for the reason that it does not show that on the said warrant was indorsed "not paid for want of funds in the treasury." That without such indorsement said warrant does not bear interest. The statute of this Territory authorizing the payment of interest on county warrants is as follows:

"That all county warrants heretofore drawn or that may hereafter be drawn by the proper authorities of any county, shall, after having been presented to the county treasurers of the respective counties of this Territory, and by them indorsed, 'not paid for want of funds in the treasury,' and from and after said date of presentment and indorsement shall draw interest at the rate of ten per cent per annum."

It will be seen that the duty of making this indorsement does not devolve upon the owner of a warrant when he presents the same for payment, but upon the county treasurer, to whom the same may be presented. It cannot be doubted but that it is the right of the owner of a warrant on presenting the same for payment to have indorsed thereon, "not paid for want of funds in the treasury." And we do not think there is much doubt but that from the date on which he was entitled to this indorsement he was entitled to all the rights that indorsement would give him. The owner of a county warrant upon the refusal of a county treasurer to make this indorsement would be entitled in a court of equity to a writ of mandamus to compel the said treasurer to make the same, and it would seem that such court ought to command the treasurer to make the indorsement, bearing date at the time the owner of the warrant was entitled to the same, otherwise this writ would not be a complete remedy for the wrong suffered. It always is the object of a court to give the relief to which a party is entitled at the time his cause of action accrued. The owner of a warrant would have the right to demand of a treasurer that he should make this indorsement bearing date at the time he should have made it. An owner of a warrant then being entitled to interest from the date at which he was entitled to this indorsement, the question presented is, should this defend-

ant be compelled to make payment without this indorsement, "not paid for want of funds in the treasury," when the evidence is in his possession and admitted to be true of the time when the right of the owner accrued. The respondent is a fiduciary agent of the county, the same as the former treasurer, Potter. The interest on these warrants is due from the county. As between the owner of this warrant and the county, the right of the owner is complete. He is in nowise in default, but the county through its officer. If then the right is complete against the county, can this officer refuse to perform its obligations when the same is within his power?

This is an equitable proceeding, and the maxims in equity applicable apply. It is a maxim of this jurisprudence that equity looks upon that as done which ought to have been done. Equity will thus consider where a party has a right to pray that the act be done. Story's Eq. Jur., § 64, *g*. In this case, then, as the appellant was undoubtedly entitled to insist upon this indorsement on his warrant, and as the same was not done through any negligence of his, but through that of another agent of the corporation of which this respondent is an agent, this court will consider this case as though this warrant had been properly indorsed, and hold that this agent must be compelled to perform this obligation of his principal. As to the objection that the county by law was to be liable for interest only from the date of this indorsement and upon the condition that it was made, we have to say that if we must in this action look upon this indorsement as having been made because it ought to have been made, the condition is complied with.

We have treated this subject thus far as though there was no doubt but that it was the duty of the county treasurers to make this indorsement. In no other statute than the one under consideration, is this duty enjoined, and in this only by implication, if at all. Certainly the title of the act which is as follows: "An act authorizing county commissioners to pay interest on court warrants," and the general scope of the act would not lead us to suppose that it intended

to define the duty of county treasurers in any particular. Probably the legislature intended to provide in some other act, that county treasurers should make this indorsement when a warrant-holder presented the same for payment This would seem to be the most rational view of this subject. If, then, it was not the duty of the county treasurer, by law, to make this indorsement, he had no legal right to make the same, and a warrant-holder would have no right to demand it of him. Under this view, then, a right would be given to warrant-holders, upon a condition they would have no power of compelling the performance of. It is an ancient maxim that the law will not compel a person to do that he cannot perform. When an estate is granted to a person upon a condition which it is impossible to perform, the condition is void, and the estate passes without the condition. Broom's Leg. Max. 244. So with any other right which the law gives upon an impossible condition. The condition is void and the right becomes absolute. Taking this view, the right of the relator to interest is complete without the indorsement.

If it is admitted that this statute does prescribe a duty of county treasurers, then it should be construed in *pari materia*, with every other statute of the Territory upon the same subject. Section 8 of the statute upon county treasurers (see Statutes of 1865, p. 518) makes it the duty of county treasurers to pay county orders in the order in which they are presented. The only provision of law which would make it the duty of the county treasurers to make any record of the presentment for payment of county warrants, is the provision of this statute providing for the payment of interest. It may be observed, then, that one of the objects of this law was to provide a means of preserving the order of presentment of warrants for payment. There is nothing in the point that the object of this law was simply to require the presentment of county warrants to county treasurers, so that this indorsement might be made, in order that they might bear interest. The very indorsement "not paid for want of funds" required to be made, shows that the present-

ment required was for payment. The view of this statute we have now taken, if it does define duties of county treasurers, makes it consistent with a reasonable intention on the part of the legislative assembly. To say that the object thereof was not to provide for an indorsement which would show that the warrant had been presented for payment at a certain time, and payment refused for want of funds in the treasury, but simply to provide an arbitrary condition, and one that would leave no utility for any other purpose, in order that a warrant might draw interest, would be inconsistent with any reasonable intention on the part of said assembly.

The statute of 1867, defining the duties of county treasurers, provides also for this very thing of preserving the order of presentment of warrants for payment; the object of the former act. We have, then, two acts, with the same object in view, and providing different means of accomplishing it. Where this is the case, we hold that the latter takes the place of the former, and renders it unnecessary, or, in other words, repeals it.

For these reasons, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

CAMPBELL et al., respondents, *v.* METCALF et al., appellants.

INJUNCTION — *damages for lost time.* In an action to recover the damages caused by the wrongful suing out of an injunction, a party can recover the value of his labor for the time he was compelled to remain idle by being restrained from working his mining ground.

INJUNCTION BOND — *damages not recoverable — attorneys' fees.* In a suit upon an injunction bond, the expenses and fees of attorneys in the action in which the writ was issued cannot be assessed as damages sustained by the wrongful granting of the injunction.

INJUNCTION BOND — *damages — assessment and apportionment by jury — attorneys' fees.* If attorneys' fees are paid for all the services rendered in an

action, including those performed in procuring the dissolution of an injunction, the party claiming damages must prove the amount of the fees that was so paid for procuring the dissolution of the injunction. A jury cannot apportion the fees paid in the action and find the value of certain services, without evidence of the same.

PRACTICE — *instructions — issues.* The court should not give instructions which will cause the jury to consider issues on which no evidence has been introduced.

Appeal from the Third District, Meagher County.

THIS action was tried in November, 1870, before SYMES, J., and the jury returned a verdict for Campbell and other plaintiffs. Metcalf made a motion for a new trial, which was overruled in May, 1871, by WADE, J. The facts appear in the opinion.

CHUMASERO & CHADWICK, for appellants.

There was no evidence showing any damages beyond merely nominal damages. Respondents should show that they had tried unsuccessfully to get work. They must show actual damages from enforced idleness. There was no evidence that respondents' mining ground was worth any thing, or would pay wages. The ground could not be worked on account of drainage. The work contemplated by respondents would have been useless. Respondents have sustained no damage on account of loss of time.

The only attorneys' fees that can be recovered are those that were paid solely on the motion to dissolve the injunction. The only evidence shows that the attorneys were paid for their services in the whole case. The injunction was dissolved as a matter of course after the verdict. The jury could not render a verdict for any, except actual damages.

SHOBER & LOWRY and W. E. CULLEN, for respondents.

The verdict will not be disturbed if there is some evidence to sustain it. Where there is no certain measure of damages, the verdict will not be disturbed, except for prejudice, passion or corruption in the jury. Hill. on New Trials, 432. § 3; *Kimball* v. *Gearhart*, 12 Cal. 48; *Baxter* v. *McKinlay*, 16 id. 76; *Burnett* v. *Whitesides*, 15 id. 35.

A verdict will not be set aside because the jury assessed higher damages than the court would have given, unless the jury were actuated by improper motives, or erroneously assessed them. Hill. on New Trials, 434, § 10; 436, § 14. If by any calculation, which the evidence will reasonably support, the verdict can be sustained as to amount, a new trial should not be granted.

Witnesses testify to the facts, and the question of damages is left to be assessed by the jury under a given state of facts. Sedgw. on Dam. 694.

The instructions were as favorable to the respondents as the law would warrant.

KNOWLES, J. This is an action on an injunction bond for damages occasioned by the wrongful suing out of an injunction. It appears from the record that one David P. Rankin had brought an action to recover the possession of a certain mining claim against respondents. That as the said mining claim was valuable only for the precious metals therein contained, and in order to prevent any judgment he might obtain from being valueless he had procured a temporary injunction pending the action restraining respondents from working said claim. The action was decided in favor of respondents. They allege that by reason of this injunction they were compelled to remain idle for a certain time, that they were damaged by reason of the filling up of their drain and shaft during the time they were restrained from working the same, and that they were compelled to pay $1,000 attorney fees to procure the dissolution of said injunction, and that they were otherwise put to expense and trouble. For all of these causes they allege their damages to be $5,000.

It appears from the testimony presented in the record that respondents were idle about sixty days, that the value of the work of all three was $18 per day. This would amount to $1,080. It does not appear what amount of damages respondents sustained by reason of filling up their drain and shaft. It appears that $1,000 was paid by respondents for attorneys'

fees in the action which involved the title to the mining claim, but it does not appear what portion of this $1,000 was paid for procuring the dissolution of the injunction. It appears they spent $100 in going to Helena to procure counsel in this action about the title to the mining claim, but what proportion, if any, was spent in procuring counsel to dissolve the injunction is not shown. The jury returned a verdict for $1,250 damages, and judgment was entered against appellant for this amount.

The attorney fees and expenses in the action between respondents and Rankin in determining the title to mining ground were not properly chargeable as damages for the dissolution of the injunction. If any portion of these attorney fees and expenses were paid for that purpose, it devolved upon the respondents to show what portion. As they failed to do this the jury were not warranted in finding any damages on account of them. The verdict of the jury is clearly erroneous then to the extent of $170.

It does not appear to us that the jury were at all to blame for this verdict, but the court. The instructions of the court are such that without much doubt the jury were misled upon this matter. The following are among the instructions given by the court:

The latter portion of the first instruction reads thus: "In estimating such damages you are to take into consideration a reasonable attorneys' fee in procuring the dissolution of said injunction."

The fifth: "Reasonable counsel fees and other expenses necessarily incurred in the defense of the injunction suit are recoverable as damages in an action on the injunction bond."

Second instruction asked by appellants:

"That the only attorneys' fees that can in a case of this kind be recovered as damages are those which are confined to the motion to dissolve the injunction and cannot include those for the trial of the question of title to the property on the merits of the action."

This portion of the instruction was given and the following refused:

"And unless the jury can separate the two branches from the evidence they will not be justified in rendering any verdict for damages on account of attorneys' fees."

Third instruction asked by appellants and refused by the court:

"If the contract relative to attorneys' fees was to pay a sum certain for the whole case, including the trial of the merits, the motion to dissolve the injunction and in all courts, to which the case might be appealed, the jury cannot separate the different species of service to be rendered and assess damages upon a portion of the same."

Fifth instruction asked by appellants and given:

"The jury in estimating damages, if they think from the evidence that any have been sustained by plaintiffs on account of attorneys' fees, can only take into consideration such as were necessarily incurred in procuring the dissolution of the injunction and do not include attorneys' fees for the trial of the merits of the action or any subsequent proceedings, nor can the plaintiffs recover for any more attorneys than were actually necessary to procure the dissolution of the injunction."

Taking these instructions altogether and considering the fact that there does not appear in the record one scintilla of evidence that shows or seeks to show what proportion of the $1,000 attorneys' fees or of the $100 expenses were properly charges as damages for the dissolution of the injunction, and the inevitable conclusion is forced upon us that the court left to the jury, as though they were a committee of experts, the novel task of determining without evidence or guides, but their own experience and judgments, what portion of this $1,000 attorney fees and $100 expenses should be apportioned as legitimate damages in procuring the dissolution of this injunction. This was a duty that might well perplex and confound the most astute expert in such matters. Surely it was not the proper province of any jury to determine such a matter. As there was no evidence to show how much money had been paid to procure the dissolution of this injunction it was improper for the court to

give any instructions which would lead the jury to consider the matter. It was certainly error in the court to refuse, as it did in the latter portion of instruction second and in instruction third asked by appellants, to instruct the jury that if the evidence did not show what proportion of these attorney fees and expenses were properly chargeable as damages for the procuring of the dissolution of the injunction, they could not find any damages for this cause.

It does not appear but that the $1,080 were proper damages in this case.

The judgment of this court is therefore that the order overruling a motion for a new trial be reversed and the judgment of the court below set aside, unless respondents shall remit $170 of their judgment and pay the costs of this action since the rendition of the verdict by the jury.

Judgment affirmed in part and reversed in part.

McFARLAND, respondent, *v.* CUTTER et al., appellants.

PRACTICE—*judgment if demurrer is illegally filed.* A party who withdraws his demurrer to a verified complaint, and obtains leave to file an answer thereto at a certain time, cannot then file another demurrer; but if another demurrer is filed, the court may disregard it and enter judgment for the want of an answer.

PROMISSORY NOTE—*suit is a demand.* A promissory note which is payable "on demand," requires no other or previous demand than the commencement of a suit thereon.

PLEADING—*complaint—allegation of—account stated.* A complaint contains a sufficient allegation of an account stated, which sets forth that the parties accounted together on a certain day of, and concerning certain work and labor, the wages due therefor and the amounts paid thereon, and that it was found and ascertained that there was due the plaintiff a certain sum which the defendants then and there agreed to pay.

PRACTICE—*findings—no exceptions to interest.* This court will not review the computation of interest in the judgment, if no exceptions were properly taken to the findings of the court below.

Appeal from the Third District, Lewis and Clarke County.

In March, 1871, the court, WARREN, J., rendered judgment in favor of McFarland. The promissory note, set forth in the complaint, was as follows:

"FORT SHAW, M. T., *May* 14, 1870.

"On demand, we promise to pay Joseph J. McFarland, five hundred and fifty dollars for value received ($550).

"CUTTER & TAYLOR."

[Stamp.]

The other facts appear in the opinion.

E. W. & J. K. TOOLE, for appellants.

The court erred in rendering judgment while the demurrer was on file and not disposed of.

No interest could be recovered on the note sued on. If the writ was a demand, interest could only be recovered from the date of the commencement of the suit.

CHUMASERO & CHADWICK, for respondent.

The first demurrer was confessedly bad. The second demurrer was frivolous, and should have been treated as a nullity. The court properly entered judgment for respondent. *Manning* v. *Tyler*, 21 N. Y. 569.

On appeal from a judgment on a frivolous demurrer, the judgment will not be reversed unless the court is of the opinion that the demurrer should be sustained. Voorhies' Code, 365, *g*, *h*.

No demand was necessary on the note before suit. Story on Prom. Notes, § 29; *Zeil* v. *Dukes*, 12 Cal. 482; *Bell* v *Sackett*, 38 id. 409; Byles on Bills, 499.

Where the complaint is verified, and defendant fails to answer, the plaintiff is entitled to judgment for the amount claimed without proof. *Tuolumne R. Co.* v. *Patterson*, 18 Cal. 415.

Interest is recoverable from the date of the note. Acts 1865, 535, § 2. Any error in computing interest should

have been corrected in the court below. *Whitney* v. *Buckman*, 13 Cal. 536.

Murphy, J. This action is brought to recover the principal and interest on a promissory note, executed by defendants on the 14th of May, 1870, for $550, and payable to plaintiff "on demand;" and also to recover a balance of $378 in favor of plaintiff, on an account stated between plaintiff and defendants on the 28th of December, 1870.

In the court below the defendants filed a demurrer to the complaint, which, on their own motion, was afterward withdrawn, and leave given to file an answer by a certain day.

On the day fixed, instead of an answer, defendants filed a second demurrer to the complaint, on the grounds, first, that the complaint alleges no demand of the note; and, second, that it does not state whether or not the account is an account stated.

This last demurrer seems to have been entirely disregarded by the court, the record disclosing no action on it whatever; and on the 24th of March, 1871, on motion of plaintiff, the court proceeded to enter up judgment against the defendants, and in favor of the plaintiff, for the sum of $985.15, being the full face of the note, with interest from the date thereof, and the full amount of the account stated, with interest from date of statement, and also for the costs and disbursements of plaintiff in the suit, amounting to $126.45.

From this judgment the defendants have appealed to this court.

It is insisted here by appellants that the court below erred in rendering judgment, while their demurrer was on file, without first disposing of it.

The court, in permitting the first demurrer to be withdrawn, in its discretion only, granted leave to defendants to file an answer; but instead of filing an answer, in compliance with the order of the court, they filed another demurrer, which, to say the least, was irregular, and might have been considered a contempt of court; and the court

had a perfect right, in the further proceedings of the case, as it appears to have done, to take no notice of it whatever, and treat it as a mere nullity.

And if the court had chosen to regard it at all — if, indeed, it could have properly done so — the demurrer could not have been sustained, because of frivolous character alone if for no other reason. As to the first ground of demurrer, the note being payable on demand admits a present debt to be due to payee or holder, is payable absolutely and at all events, and requires no other or previous demand than the institution of a suit thereon. In support of this position see Story on Prom. Notes (6th ed.), § 29, and authorities there cited; also 12 Cal. 482; 38 id. 409; 3 Wend. 13.

And, as to the second ground, the complaint alleged indebtedness for certain work and labor performed by the plaintiff for defendants, at their instance and request, for a certain period of time, and at certain stipulated wages, and then goes on to say "that, on the 28th day of December, A. D. 1870, this plaintiff and the said defendants accounted together of and concerning the said work and labor, and the wages due therefor, and the amounts paid on account thereof by the said defendants to this said plaintiff; and it was found and ascertained that there was due the plaintiff from said defendants the said sum of $378, which said sum the said defendants then and there agreed to pay," etc.

We hold this to be a very clear and amply sufficient allegation of an account stated, and must consider the demurrer in that regard, as in the other, simply frivolous and evidently filed for delay, and not such as to warrant a reversal of judgment.

But it is further insisted by appellants that the court below erred in the computation of interest on the note. The record shows no exception whatever to the findings of that court in this particular, and this court can, therefore, consider none here.

Appellants should have availed themselves of the proper exceptions in the court below, if they desired to take ad-

vantage of any erroneous computation in the court above. This court will only review and correct such errors of the court below as the record discloses were properly excepted to there.

The defendants failing to answer, and the complaint being properly verified, the plaintiff was entitled to a judgment upon the complaint without proof.

Judgment affirmed.

ORR, appellant, *v.* HARDING et al., respondents.

PRACTICE — *dismissal of appeal — motion to re-instate.* An appeal that has been dismissed will not be re-instated on the motion of appellant, supported by his affidavit, showing that his neglect to perfect the appeal was caused by the verbal statements or agreement of the respondents.

Appeal from the Third District, Meagher County.

THE facts are stated in the opinion.

S. ORR, *pro se.*

CHUMASERO & CHADWICK, for respondents.

MURPHY, J. This is an appeal from a judgment in favor of defendants, in the third district court, Meagher county, at its May term, 1869.

The transcript was filed in this court on the 4th of June, 1870, and at the August term thereafter, a diminution of the record was suggested, and the case continued at the cost of the appellant.

The perfected record, however, was not filed till the third instant, about twelve months afterward.

But, at the last January term of this court, the appeal was on motion dismissed, with leave to re-instate upon cause shown.

And the case is now before us on motion of appellant to re-instate, supported by his own affidavit, that "he was prevented from having the record perfected, by one of the defendants (Harding) asking him to hold on and not send the record until he (Harding) would see him (affiant) again with a view to compromise," and was, therefore, taken by surprise by the action of the court in dismissing the appeal.

Does this show such proper and sufficient cause as to warrant this court in sustaining the motion and re-instating the cause on the calendar?

We think not. This court cannot look to and be governed by such mere verbal outside requests, statements, understandings or agreements, between either parties or attorneys in a case not reduced to writing, raising no legal obligation, and of no binding effect upon the parties thereto.

Besides, the term at which the appeal was dismissed was permitted entirely to pass, without any steps whatever being taken to have the case restored, in compliance with rule second of the rules governing the practice in this court.

The motion to re-instate is overruled.

Motion to re-instate denied.

McDONALD, respondent, *v.* STOKEY, appellant.

BANK CHECK — *indorsement of — bill of exchange — days of grace — protest.* An instrument in these words,

"No. 4, HELENA, M. T., *May* 15, 1871.

[Stamp.]

"FOX & LYSTER, *Bankers*:

"Pay to Thomas Cotsworth, or bearer, twenty dollars.

"CHARLES HENDRIE."

Indorsed: "GEORGE STOKEY."

is not a bill of exchange, but a "check for funds deposited in bank," and is not entitled, under the laws of this Territory, to any days of grace, and the indorser is liable without any notice of its non-payment.

BANK CHECK — *characteristics of.* A bank check is always drawn on a bank or banker, and is an absolute appropriation of a certain sum in the hands of the banker; it is payable immediately on presentation on the day designated, and presented only for payment, and is not allowed any days of grace.

Appeal from the Third District, Lewis and Clarke County.

THIS action was tried in August, 1871, and judgment was entered for McDonald, by WADE, J., on the verdict. The facts appear in the opinion.

CULLEN & COMLY, for appellant.

The terms, "bills of exchange" and "promissory notes," include every species of commercial paper. *Harker* v. *Anderson*, 21 Wend. 373; Byles on Bills, 26.

The legislature intended that all the rules of commercial paper, except that relating to days of grace, should apply to the checks sued on. Acts 1865, 343; Broom's Leg. Max. 638.

Modern decisions place checks on the same basis as bills of exchange, and the same diligence and character of notice are required to charge an indorser upon a check and bill of exchange. *Minturn* v. *Fisher*, 4 Cal. 35; *Merchants' Bank* v. *Spicer*, 6 Wend. 445; *Smith* v. *Jones*, 20 id. 194; *Sutter* v. *Burt*, id. 205; *Harker* v. *Anderson*, 21 id. 373; *Sherman* v. *Comstock*, 2 McLean, 19; Story on Prom. Notes, § 495.

The appellant was not liable upon the checks until he had been served with notice of its presentation, demand and non-payment, as required for bills of exchange. Acts 1865, 343.

This act is *in pari materi* with the section applicable to persons holding over lands, tenements, etc. (Acts 1865, 174, § 658), in which case a notice in writing is material. *Livingston* v. *Turner*, 14 N. Y. 64.

SHOBER & LOWRY, for respondent.

The checks sued on are expressly excepted from the provisions of the statute relating to bills of exchange. Acts 1865, 343, § 2.

Checks are not entitled to days of grace. Byles on Bills, 285; Story on Prom. Notes, 673–675.

An order on a bank to pay on a future day is a check, and is not entitled to grace. Byles on Bills, 86 (n.); 3 Kent's Com. 104; *Taylor* v. *Wilson*, 11 Metc. 52.

The object of the law is to give the indorser notice, and it is immaterial whether it is written or verbal, if it is given by the holder at the proper time. Story on Prom. Notes, § 315.

Demand of payment of a check must be made with reasonable diligence, according to the circumstances of the case. *Mohawk Bank* v. *Broderick*, 13 Wend. 133. Due diligence was used in this case by respondent. The checks were presented at the bank on the day they were payable, and the appellant was notified of their non-payment. This action was properly brought after the checks had been presented and payment refused, and the appellant had had notice thereof without delay.

MURPHY, J. This suit was brought to recover the sum of $191, with interest and costs, upon three certain instruments of writing, sued on as bank checks, drawn by one Charles Hendrie on the 15th of May, 1871, on the banking house of Fox & Lyster, Helena, numbered 4, 6 and 13, and for the sums of $21.90, $23.70 and $145.50, respectively, and indorsed by defendant, Stokey, to plaintiff, McDonald, for a valuable consideration.

The cause was tried by a jury below, and a verdict and judgment for plaintiff, for full amount of checks, with interest, and costs and disbursements of plaintiff. From which judgment defendant appeals to this court.

It seems that the only question necessary for us to consider here is, whether or not these checks are in effect "bills of exchange," and come within the purview of the legislative act of December 31, 1864, concerning bills of exchange and promissory notes, section 6 of which requires the holder, in order to make the contingent liability of any indorser of any bill of exchange or promissory note absolute, to cause

it to be presented at the place where, by its terms, it is payable, if any place is specified therein, otherwise to the person who is primarily liable, for payment, and if payment on such presentation at maturity be neglected or refused, to cause a written or printed, or partly written and partly printed, notice of such presentation, demand and non-payment, briefly describing the bill or note, to be served immediately thereafter upon the indorser, unless the same shall be protested in the usual manner by a notary public.

By section 2 of said act, it is provided that "three days of grace shall be deemed and taken to apply to all bills of exchange and promissory notes maturing within the Territory." But in the same section it also declares that "this provision shall not extend to drafts payable at sight, nor to checks for funds deposited in bank, or elsewhere, subject to draft at sight."

Now if these instruments are in fact "bills of exchange," or can be properly so considered, within the meaning of the act referred to, they must be governed by the same rules as to notice, etc., and are entitled under the statute to three days of grace, and the indorser, before he can be held liable, to due notice, either in printing or writing, or in both, of presentation, demand and non-payment, or to notice by means of protest.

Otherwise, they can be treated only as "checks for funds deposited in bank," and by the terms of the statute, entitled to no days of grace, and the indorser to no notice.

But are they in fact, as in case of "bills of exchange," within the meaning of the statute? And did the legislature intend to subject the holder of such instruments to the vexation and delay, not to say injury, that might occur, if, in order to hold an indorser responsible, he were compelled to resort to the formality of serving a written or printed notice or procuring a regular protest at the hands of a notary public?

As contradistinguished from bills of exchange, the distinguishing characteristics of checks are, that they are always drawn on a bank or banker, are payable immediately

on presentment, are not allowed any days of grace, and are never presented for mere acceptance, but only for payment.

And Chancellor KENT, in his learned commentaries, says that a check is an acknowledgment of a certain sum due, and that it is an absolute appropriation of so much money in the hands of the drawer's banker to the holder.

In this respect a check materially differs from a bill of exchange, which at law is not an appropriation of the money of the drawer or maker until its acceptance, which is never necessary in the case of a check.

Now these instruments are each drawn on Fox & Lyster, bankers, which fact of being drawn upon a bank or bankers, is the principal feature that distinguishes checks from bills of exchange, and the main characteristic which serves to determine whether any particular instrument of this character is a check or a "bill of exchange." They simply require these bankers to pay to the persons therein named the sums of money therein specified, respectively, not on a future or different day from their date, as they might have done by being post-dated, but from their very terms evidently intending payment to be made on the same day they were drawn, or immediately on demand, without any days of grace whatever and without the delay of presentation for mere acceptance.

And they seem on their face to unmistakably import a present sum due, and a simple appropriation of that sum, from the funds of the maker, in the hands of his banker, to the use of the holder.

Besides they seem to be otherwise and in all respects in the usual form and to possess all the necessary characteristics of ordinary checks upon funds supposed to be on deposit in bank to the credit of the drawer.

This whole subject is elaborately and ably discussed in the *Matter of Brown*, 2 Story, 502. The words of the instrument sued on there and these sued on here are precisely alike, except only as to names, sums and times of payment, those being post-dated, and in effect payable on

a future day, and these payable on the very day of their date, or immediately on presentment.

And notwithstanding the fact of the instruments in that case being payable on a different day from their date, yet the court held that they were nevertheless checks and payable on the very day specified, and without days of grace. And in support of that decision various high authorities are cited. See, also, 11 Metc. 44.

In short, there can be no doubt that it is the usage of banks, and the understanding of the parties to instruments of this character, to treat them as checks and payable immediately on presentment, on the very day of their date or on the precise day designated. And being the constant habit of business among commercial men, it has become like all other usages of merchants, the *lex et norma*, by which to arrive at the true intent of the parties and to correctly expound the contract.

The parties have, in the present case, used the common form of ordinary bank checks, and by so using them they impliedly authorize the bank to treat them as checks and to pay them as checks, payable on the very day of their date, immediately upon presentment, without any days of grace or other delay whatever.

We hold, therefore, that these instruments are simply "checks for funds deposited in bank," and by express provision of the statute, consequently entitled to no grace, and in fact not included, nor by the legislature so intended to be included within the meaning of that other provision of the act, which, in order to hold an indorser liable, requires, as to bills of exchange or promissory notes, written or printed notice of formal presentment, demand and non-payment, or notice by the usual process of regular protest by a notary public, to be served upon the indorser.

The judgment is affirmed.

Judgment affirmed

TERRITORY OF MONTANA, respondent, *v.* MCCLIN, appellant.

EXCEPTIONS — *allowance of — statement.* Exceptions will be considered by this court if there is a statement at the beginning of the bill that the exceptions were taken at the proper time and allowed.

CRIMINAL LAW — *evidence — conviction on confessions.* The testimony of a confession of guilt by the accused, which is not corroborated by any other evidence, is insufficient to sustain a conviction.

CRIMINAL LAW — *confessions to officers.* Confessions of guilt by the accused cannot be admitted in evidence, if they were not made voluntarily; and such confessions, made to an officer having the accused in custody, will be rejected if they were made after the officer had said that it would be better for him to confess his guilt.

Appeal from the First District, Gallatin County.

MCCLIN was tried in June, 1871, by a jury, who returned a verdict of guilty, and the court, MURPHY, J., sentenced him. The other facts are stated in the opinion of the court, the remarks of MURPHY, J., and the note of the reporter.

S. WORD and PAGE & COLEMAN, for appellants.

Appellant was convicted upon his confession. There was no other evidence of guilt, and such a conviction could not be had. *People* v. *Hennessey*, 15 Wend. 148; *People* v. *Badgley*, 16 id. 53.

Appellant's confessions were not voluntary, and should have been excluded. 1 Phil. on. Ev. 542, 543; *People* v. *McMahon*, 15 N. Y. 384; *People* v. *Wentz*, 37 id. 303; *Hartung* v. *People*, 4 Park. C. C. 319.

The confessions of appellant to the officer having him in custody were inadmissible after officer had advised him to make the confessions. 1 Phil. on Ev. 542, 543, 557; *Regina* v. *Warringham*, 2 Lead. Crim. Cas. 167.

Any subsequent confession of guilt made by appellant was inadmissible, unless it appeared that the inducements of the officer and owner of the goods taken had been withdrawn and their influences removed. 1 Phil. on Ev. 551-554. The court erred in refusing to allow the officer, Guy, to answer the question put to him by appellant.

The instructions of the court were erroneous. See authorities already cited.

If the confessions were improperly admitted, the judgment of conviction should be reversed. *Acquittal* v. *Crowell*, 1 Cal. 191; *Junis* v. *Steamer Senator*, id. 459; *Grimes* v. *Fall*, 15 id. 63.

H. N. BLAKE, district attorney, first district, for respondent.

The transcript does not show that any exceptions were properly taken by appellant or allowed. They must be settled, signed, sealed and filed as allowed by law in civil cases. Acts 1865, 244, § 177.

This assertion in the transcript must be disregarded, to wit: "Now comes the defendant by his attorneys, and tenders the following bill of exceptions, which were taken at the proper time and allowed." It is not certified to be correct by the judge or counsel.

The bill of exceptions is a mere statement of evidence. No error of the court is complained of. The appellant did not except to the action of the court at the trial. This court cannot review the same. *People* v. *Thompson*, 28 Cal. 218; *People* v. *Martin*, 32 id. 91; *People* v. *Dick*, id. 214; *People* v. *Trim*, 37 id. 275.

The appellant was not injured by the confession specified in the first exception, as it was excluded from the jury by the court.

The question put to the officer, Guy, about soliciting appellant to confess, was "ruled out by the court." No objection was made to the same, and no exception was taken to the ruling thereon.

The instructions referred to in the bill were not excepted to by anybody. They may have been given at the request of the appellant. The record is so defective in this respect that they cannot be reviewed.

The evidence detailed in the bill was "objected to" by appellant, when it was offered. No exception was taken to its admission, and there is nothing for the court to review.

The failure of appellant to take any exception to the above

evidence or instructions was an acquiescence in the judgment of the court and a waiver of any right to appeal. *People* v. *Wooster*, 16 Cal. 435; *Turner* v. *Tuolumne C. W. Co.*, 25 id. 398.

The ground on which the evidence was objected to is not stated. A general objection is insufficient. *People* v. *Rodriguez*, 10 Cal. 50; *People* v. *Frank*, 28 id. 507.

The admission of the evidence was discretionary with the court. 1 Greenl. Ev., § 219; *People* v. *Jim Ti*, 32 Cal. 64.

WADE, C. J. This case comes into this court on appeal from the judgment and bill of exceptions, upon the separate trial of defendant, James F. McClin, indicted jointly with defendants, Nathan Ward, David Collier and John Maloney, for the crime of burglary.

It is contended by respondent that the record does not disclose the fact that any proper exceptions were taken at the trial to the rulings of the court upon the introduction of evidence, or to the charge of the court to the jury. This is an appeal from the judgment-roll, and the bill of exceptions is properly before the court for consideration The bill of exceptions commences as follows:

"Now comes the defendant by his attorneys and tenders the following bill of exceptions, which were taken at the proper time and allowed."

We think these words form a part of the bill of exceptions, and the bill being signed by the judge as correct, we must hold that to any ruling of the court, objected to at the time, as disclosed by the bill of exceptions, proper exceptions were taken at the time and allowed. This is the plain import and meaning of the language employed.

We are then to consider the case as disclosed by the bill of exceptions and the record. By the record the defendant was convicted upon the evidence of confessions alone. As shown in the testimony the defendant was arrested by one John Guy, deputy sheriff, and that he told defendant that it would be better for him to confess his guilt. There appears the following in the bill of exceptions:

"In addition to the above, further evidence being adduced that a mob of one hundred men were around and about the jail where defendant was confined at intervals of nearly all one day; that threats were frequently made against defendant that if he did not confess he would have one hundred lashes, would be hung, etc.; that word was brought to defendant that one person confined with him and recently taken out by the mob had been hung; that the names of defendant and others confined in jail and the addresses of their parents and friends had been taken down by John Guy, deputy sheriff, in writing, with their knowledge, that in consequence of these threats and demonstrations defendant was greatly excited and alarmed so that he shed tears; and further, no evidence being produced that the inducements held out by the said deputy sheriff, John Guy, were at any time withdrawn, or that the mind of the defendant was at any time freed from the apprehensions occasioned by said violent threats and demonstrations; the court admitted as evidence confessions of guilt made by defendant to said Guy at intervals for several days afterward. Defendant's attorneys objected to the evidence at the time it was offered. The foregoing testimony having been adduced, the defendant's attorneys put the following question to the witness, Guy: 'Were the confessions of defendant made subsequent to the day of his first confession, made at your solicitation and advice, that it would be better for him?' which question was ruled out by the court.

"The court then charged the jury that they should regard as evidence all confessions of guilt made by defendant to said Guy after the day of the first confession."

We think the court erred in refusing to permit the witness, Guy, to answer the question above set forth, and we are of opinion that a conviction upon the testimony of confessions alone is not warranted by the authorities.

Whether *extra judicial confessions*, *uncorroborated* by any other proof of the *corpus delicti*, are of themselves sufficient to found a conviction, has been gravely doubted. In the Roman laws such naked confessions would not work

out a conviction. In each of the English cases usually cited in favor of the sufficiency of this evidence there was some corroborating circumstances. In the United States the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law. 1 Greenl. Ev. 246; Phillips' Ev. 542, 543 and note; 15 Wend. 148; 16 id. 53.

Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. The preliminary examination for this purpose must be addressed to the judge. "A free and voluntary confession," said Chief Justice EYRE, "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers, but a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." 1 Leach's Crim. Cas. 299; 15 Wend. 231; Phillips' Ev. 542; 15 N. Y. 384; 37 id. 303.

In regard to the person by whom the inducements were offered, it is very clear that if they were offered by the prosecutor, or by an officer having the prisoner in custody, or by a magistrate, or, indeed, by any one having authority over him or over the prosecution itself, or by a private person in the presence of one in authority, the confession will not be deemed voluntary and will be rejected. 1 Greenl. Ev. 253, § 222.

In view of these authorities and principles which seem to be well settled, we think the court erred in refusing to permit the deputy sheriff, Guy, to answer if the alleged confession was not made upon his solicitation and advice to the prisoner that it would be better for him to confess.

Confessions to an officer, if admitted in evidence in any court, should be so admitted with the greatest care and caution, and after the possibility of any and every inducement has been removed, and the authorities seem to go to the extent of excluding any confession made to an officer under any circumstances. There may be some doubt as to this position, but certainly there is no doubt where the officer makes any promises or threats to induce a confession.

There was no evidence in this case, except the bare, naked confession of the defendant, as shown by the record, and it is exceedingly doubtful if a conviction could be worked out upon such testimony alone.

The verdict and judgment of the court below is set aside and a new trial granted.

Judgment reversed.

MURPHY, J., concurred in the foregoing opinion by making the following remarks:

I sign this opinion upon the made record as it has appeared, but with the statement that the bill of exceptions was signed upon agreement between the district attorney and defendant's counsel, without examination, and is both incorrect and incomplete, and does not present the case at all as it was tried below.

NOTE. The words "Now comes the defendant by his attorneys and tenders the following bill of exceptions, which were taken at the proper time and allowed," were written by the clerk of the court in his journal at the time he copied the bill of exceptions, after the court had adjourned for the term. The district attorney and counsel for appellant did not sign any bill of exceptions that contained the foregoing words. The journal of the clerk was signed by MURPHY, J., "without examination."

At the October term, 1871, McClin was again convicted and received the same sentence, five years in the territorial penitentiary.—REP.

CREIGHTON et al., appellants, *v.* VANDERLIP et al., respondents.

CONTRACT TO PAY GOLD DUST — *promissory note — merger — agreement.* A contract for the payment of gold dust, in the nature of a promissory note, is not merged in an agreement, by which the time for its payment is extended, the rate of interest reduced, and the means of paying it placed in the hands of the parties liable thereon; and this agreement cannot be introduced in evidence under the allegations of the answer that the agreement released the parties from any liability to pay the gold dust.

PROMISSORY NOTE — *merger.* A promissory note is not merged in an agreement which does not expressly defeat a right of action thereon.

AGREEMENT CONSTRUED — *situation of parties.* The situation of the parties to an agreement can be considered by the court to ascertain the meaning of the instrument.

Appeal from the First District, Madison County.

THIS case was tried by a jury, in November, 1870, and verdict rendered for defendants. The court, WARREN, J., overruled the motion for a new trial, and Creighton appealed. The facts appear in the opinion.

H. N. BLAKE, for appellants.

The agreement betwen appellants and respondents, Thomas and McRoberts, is not a defense in this action. If there has been a breach of the agreement a suit would lie. 2 Pars. on Notes & Bills, 530, 531, 536, 538; *Dow* v. *Tuttle*, 4 Mass. 414; *Shed* v. *Pierce*, 17 id. 627; *Central Bank* v. *Willard*, 17 Pick. 153; *Allen* v. *Kimball*, 23 id. 473; Barclay's Mo. Dig. 96, §§ 98, 99.

The agreement shows that the note was not merged in the same. The measure of damages is fixed. The evidence relating to the capacity of the ditch, and quantity and value of water was improperly admitted. (See Agreement.) The respondents did not ask for special damages in their answer. The court erred in allowing evidence thereof and refusing to give instructions prayed for by appellants.

W. Y. LOVELL, W. F. SANDERS and S. WORD, for respondents.

Appellants rely on part of the agreement, and respondents are entitled to the whole. 2 Pars. on Cont. 499, § 3.

The note and agreement made but one contract, and it must be enforced as such. 2 Pars. on Cont. 534, 535; *Miller* v. *Stewart*, 9 Wheat. 681.

Appellants must show that they were without laches before they can sue on the contract. 1 Chit. Pl. 324; *Slater* v. *Emerson*, 19 How. 224. The law never releases a party who is in fault.

The note was merged in the agreement, which says its stipulations are a "settlement of said suit" on the note the first time, and that it is a settlement of "all matters of dispute or difference by reason of said note being unpaid." 4 Kent's Com. 111.

The agreement, in express terms, releases respondents, Thomas and McRoberts, from any liability on the note, and was competent evidence. 16 N. Y. 535.

It was the province of the jury, not the court, to say what the actual damages were.

The case is here on the judgment roll alone. Civ. Prac. Act, § 322; *Kinna* v. *Horn*, *ante*, 363; *Simonton* v. *Kelly*, *ante*, 329.

WADE, C. J. This case comes into this court upon appeal from an order in the court below, overruling a motion for a new trial.

The complaint is founded upon a written instrument, of which the following is a copy:

"VIRGINIA CITY, M. T., *Nov.* 5, 1867.

"Six months after date we, or either of us, promise to pay to Norval Harrison and Columbus Hampton, or order, two hundred and twenty-two ounces four and one-half pennyweights of clean gulch gold dust, or its value, with interest at the rate of five per cent per month until paid.

"F. D. VANDERLIP,
"W. H. THOMAS,
"JOHN McROBERTS."

The complaint avers, that for a valuable consideration on the 16th day of March, 1868, this note or contract was trans-

ferred by Harrison & Hampton to plaintiffs, and that plaintiffs are now the owners thereof, and that on the 18th day of July, 1868, the plaintiffs entered into an agreement with said Thomas and McRoberts, whereby the rate of interest to be paid on said instrument was to be computed at the rate of five per cent per month from the 16th day of March, 1868, to the 18th day of July, 1868, and at the rate of three per cent per month from the 18th day of July, 1868, until the same should be paid. That no part of the principal or interest has been paid, and that the same is now due to plaintiffs.

The defendant Vanderlip does not answer. The separate answer of defendants, McRoberts and Thomas, admits the execution and delivery of the note or contract described in complaint, the assignment thereof to plaintiffs on the 16th day of March, 1868, and the agreement as to the rates of interest as specified in said complaint. But said defendants, defending against the cause of action set forth in the complaint, aver, that on the 18th day of July, 1868, at Virginia City, Montana Territory, said plaintiffs, under the firm name and style of P. A. Largey (that being one of the firm names of said company), entered into an agreement with said defendants, Thomas and McRoberts, for a valuable consideration, whereby it was promised and agreed, in consideration of the covenants and promises in said contract contained, to be done and performed by said defendants, the said plaintiffs did then and there and thereby release these defendants from any and all liability on the note or contract in the complaint set forth and described.

The agreement whereby these defendants claim to be released and discharged from the obligations of the note or contract upon which this suit is instituted, and from all liability thereon, is in the words and figures following, to wit:

"AGREEMENT."

"This agreement, made and entered into on this 18th day of July, A. D. 1868, by and between Patrick A. Largey

of the first part, and William H. Thomas and John McRoberts of the second part, witnesseth:

"WHEREAS, the said Thomas and McRoberts did, on the 5th day of November, A. D. 1867, with one Frederick D. Vanderlip, make, execute and deliver to Columbus Hampton and Norval Harrison, their certain promissory note, whereby they promised to pay and did obligate themselves to deliver to said Hampton and Harrison, for a valuable consideration, the amount of 222 ounces 4½ pennyweights of clean gold dust, or the sum of $4,000 in gold, the value of said gold dust, with interest from date, at the rate of five per cent per month until paid, and payable in six months from date of said note, which said note was secured by said Vanderlip by a certain mortgage duly executed and recorded; a reference for a full and perfect description of the same is hereby made to the copy of the same hereto attached and made part of this agreement; and,

"WHEREAS, the said Columbus Hampton and Norval Harrison did, for a valuable consideration, sell, assign, transfer and set over said note and mortgage, for a valuable consideration, on the 16th day of March, A. D. 1868, to E. Creighton & Co.; and,

"WHEREAS, the said Vanderlip, Thomas and McRoberts have failed to pay said note; and,

"WHEREAS, the said P. A. Largey has commenced suit on the same, in the district court of the first judicial district, in and for the county of Madison and Territory of Montana, by attachment; and,

"WHEREAS, the said writ of attachment has been levied upon certain property of said Thomas and McRoberts;

Now, therefore, in consideration of the sum of $1 each to the other paid, by the parties to this agreement, and the further consideration of the settlement of said suit, and all matters in dispute in difference by and between the said Largey, Thomas and McRoberts, by reason of said note being unpaid, it is agreed:

"1. That said Largey, his heirs or assigns, shall dismiss

his said action in the district court now pending, and release all of the said Thomas and McRoberts.

"2. That the said Largey, his heirs or assigns, agree with the said Thomas and McRoberts, that the only interest to be computed at five per cent per month, from the 16th day of March, A. D. 1868, until the 18th day of July, 1868; and from and after that day the interest to be computed, and it is expressly agreed that though the said note calls for five per cent interest per month, the same shall only bear interest and be computed as against the said Thomas and McRoberts, at the rate of three per cent per month until paid; and that the said Largey agrees and binds himself, his heirs and assigns, to forbear suit, to prosecute or in any manner to enforce the collection of said note or interest on the same, as against or from the said Thomas and McRoberts, for the space of one year from the said date of July 18, 1868.

"3. It is further agreed, that in order to enable the said Thomas and McRoberts, their heirs and assigns, to pay said note and interest out of the property named in said mortgage, to wit: the ditch, right of water and mining ground therein named, that the said Largey agrees and binds himself to at once deliver the quiet and peaceable possession of all the property named in said mortgage to the said Thomas and McRoberts upon the following terms and conditions, to wit: that is to say, that said Thomas and McRoberts shall take charge of all of said property, use and work the same to the best advantage, by the sale of water or the working of said mining ground, as in the judgment of the parties hereto may seem best for the interests of all the parties hereto; and after deducting all necessary expenses and charges, shall pay all moneys and gold dust that may come into the hands of said Thomas and McRoberts from said property, from any source therefrom unto the said P. A. Largey, his heirs or assigns; which money or gold dust so paid and received by said Largey shall be appropriated and applied by him or his assigns, in the manner following, to wit:

"First, to the payment of a certain promissory note or to

any sum that may be now due thereon, or the interest that may be due or to become due, which said note is also named and set out in said mortgage and now owned by said P. A. Largey, calling for 222 ounces, 4½ dwts. of clean gold dust, or equal to $4,000 in gold, with interest from date until paid at five per cent per month, and dated November 5, 1867, and signed by F. D. Vanderlip and one James McEvily; and after the payment of said note and interest, as aforesaid, then the said P. A. Largey or his assigns shall apply all money or gold dust as paid by said Thomas and McRoberts from said property named in said mortgage, after deducting actual expenses of said Thomas and McRoberts as aforesaid, with the interest to be computed at three per cent per month, as named in said note from said 18th day of July, 1868, until paid; and that when said several notes with the interest thereon shall have been paid said Largey or his assigns as aforesaid, by said Thomas and McRoberts, then and in that case, it is agreed and the right of possession and occupancy to all of the property named in said mortgage is hereby given and continued in and to said Thomas and McRoberts or their assigns, for such length of time as may be necessary, by reasonable use and work of said ditch and ground as aforesaid until the said Thomas and McRoberts shall have re-imbursed and paid back to themselves all the money or gold dust, with interest, at said rate that they may have paid upon said note, as signed by said Vanderlip, McRoberts and Thomas, to said P. A. Largey; and when so re-imbursed and paid back in full, then they shall, without process of law, return and deliver the property so held by them to the said Largey or his assigns.

"4. It is further agreed and understood by and between the said parties hereto, that in the event that said ground and the rent or sale of water from said ditch, or the diversion of the water from such ditch, if by any, or from any of, said causes, the said Thomas and McRoberts are prevented from paying said notes last named and the interest thereon, then and in that case, after reasonable time and fair effort by said Thomas and McRoberts, then and in that case the said P. A. Largey binds himself, his heirs

and assigns, to rebate and not require or demand any interest whatever of the said Thomas and McRoberts, but that all payments that may have been made by them shall be deemed, and are hereby declared to be, payments of the debt and principal of said note.

"5. It is further agreed and understood that to the enjoyment and fulfillment of the promises, agreements and undertakings, as herein expressed, that said P. A. Largey or his assigns agree and bind themselves that they will place the said Thomas and McRoberts in the quiet possession of all the property herein named, and that he will maintain and keep good said possession without, and free of, expense to said Thomas and McRoberts.

"6. It is further agreed, that to secure the payment of said last mentioned note and the faithful execution of this agreement, that the said Thomas and McRoberts shall cause to be made and executed to the said Largey or his assigns a mortgage by G. W. Allen of an undivided one-fourth interest in all the property now owned by the Highland and Pine Grove Fluming Company, of Madison county, M. T., and of three hundred feet square of mining ground on East Bummer Dan Hill, in Fairweather district, county and Territory aforesaid.

"7. It is further agreed and understood by and between the parties hereto, that for the faithful and perfect execution and performance of each and every agreement and undertaking as herein expressed, we do bind ourselves, each in the penal sum to the other, of ten thousand dollars, to be well and truly made.

"Witness whereof we have each set our hands and seals this 18th day of July, A. D. 1868.

"P. A. LARGEY, [L. S.]
"W. H. THOMAS, [L. S.]
"JOHN McROBERTS. [L. S.]

"Signed in our presence,
"WM. Y. LOVELL,
"G. W. ALLEN.
"Done in duplicate."

To the introduction of this agreement in evidence by the defendants, the plaintiffs objected, upon the ground that it is no defense to the contract for gold dust; that it does not support the averments of the answer, and that, if plaintiffs are liable thereon, their proper remedy is a suit upon the agreement. These objections to the agreement were overruled, and the agreement received in evidence. This action of the court is assigned for error, and the main question presented by this record is, as to the admissibility of the foregoing agreement in evidence, under the pleadings in this case.

The defendants aver, in their answer, that the agreement of July 18, 1868, released them from all liability upon the contract for gold dust, and that they are wholly discharged from the obligations of the same. It is claimed by defendants that this agreement is a merger of the gold dust contract, that it was designed to, and that it does, take the place of said contract, and that, by reason of this agreement, a right of action upon the contract or note in complaint described has ceased.

It thus becomes necessary to ascertain, by careful analysis and interpretation, the true intent and meaning of the agreement of July 18, 1868.

At the time this agreement was made, the contract for gold dust (or note, as I will hereafter call it for convenience) had become due, and a suit in attachment had been commenced against defendants, including defendant Vanderlip, and this situation of the parties we have the right to consider, to enable us to properly interpret their acts. The plaintiffs were demanding their pay upon the note then due and unpaid: the defendants could not meet this obligation, and this agreement was the result of this situation. Was it the intention of the parties thereto, and did they in terms merge the note in the agreement, and thereby abandon and lose their rights and interests in the note? The answer to this question will decide the case.

The stipulations of the agreement:

(1.) Caused the suit in attachment to be dismissed and settled.

(2.) It changed the rate of interest on the note from five per cent to three per cent per month.

(3.) It extended the payment of the note for one year, from July 18, 1868.

(4.) It stipulated to deliver ditch and mining property therein described to defendants Thomas and McRoberts, and from the proceeds thereof to pay first a note held and owned by plaintiffs against Vanderlip and one James McEvily, for two hundred and twenty-two ounces and four and one-half pennyweights of gold dust; and, second, to pay the note in the complaint described; and, third, to remain in possession of said property, and to work the same until they should fully re-imburse themselves, and pay back to themselves all the moneys or gold dust that they should so pay on said notes.

(5.) If, from any cause, defendants are hindered or prevented, by rent or sale of ditch and mining property, from paying notes, then the plaintiffs bind themselves to rebate all interest on note in complaint described, and the payments that have been made to be applied upon the principal of said note.

(6.) To further secure the payment of said note, the defendants agree to cause one George W. Allen to execute and deliver to plaintiffs a mortgage of one undivided one-fourth interest in the Highland and Pine Grove Fluming Company of Madison County, M. T.

It will be observed that the note, as a distinctive separate obligation, is nowhere lost sight of in this agreement. The rate of interest is changed from five to three per cent per month, but the note is still to bear interest and to be in full force and operation for that and all other purposes. The time of the payment is delayed for one year, but at the end of the year the amount due thereon could have been demanded, and can it be doubted that a suit thereon could have been instituted and payment enforced, notwithstanding this agreement?

The full force and effect of this agreement was, to extend the time for the payment of the note, and to reduce the rate of interest thereon, and it operates simply as collateral security to the note. The note was due. The plaintiff promised to delay payment, but, in consideration of such promise, he was to receive a mortgage against Allen, and the note against Vanderlip and McEvily was to be paid.

The agreement operates to place in the hands of the defendants the means whereby to pay the note, and every purpose and intent thereof was to create security for the payment of the note, and if there has been a failure to perform this agreement by the plaintiffs, on their part, an action could be maintained against them thereon, but whether the agreement itself fixes the measure of damages, and whether it could be set up as an equitable defense to this note, it is not now necessary to determine.

The agreement operates to delay the payment of the note, and where the promisee of a note, payable at a day certain, contracts at the time the note is given or after it has become due, not to demand payment of it until a certain time after its maturity, such contract is a collateral promise for the breach of which, if there be a legal consideration, an action may lie, but it will not bar an action on the note when due by the terms of it. 4 Mass. 414. An agreement, to operate as a merger of a note, must be such a one as by its terms or by its legal intent and meaning would defeat a right of action on the note.

This agreement was offered and received in evidence to support the allegation of the answer, that the agreement released defendants from all liability on the note. We are of opinion that the agreement does not operate to that extent, and that it does not support the allegation of the answer; and, upon the principle that the evidence offered must correspond with the allegations, and be confined to the point in issue, the agreement was improperly received in evidence under the pleadings in the case.

It may be proper to remark, that although the damages that may have resulted to the defendants, by a breach of

this contract on the part of the plaintiffs, may have been set up as an offset to the note (a question we do not think necessary to decide), yet, there are no allegations of damages, for the breach of said contract in the answer, which would entitle the defendants to prove the same.

The order overruling the motion for a new trial is set aside, judgment reversed, and cause remanded for further proceedings.

Exceptions sustained.

ROBERTSON et al., respondents, *v.* SMITH et al., appellants.

STATUTORY CONSTRUCTION — *mining act of congress — rights of miners.* Section 9 of the general mining act of the United States, approved July 26, 1866, grants to the proper persons an easement upon the mineral lands of the public domain, which they may appropriate according to the local rules and customs of miners in the mining district in which the same may be situated, and thereby legalizes the mining upon the public lands of the United States for the precious metals.

POSSESSION OF MINING GROUND — *presumption — mining customs.* It will be presumed, in the absence of evidence, that the parties in the possession of mining claims hold them according to the local rules and customs of the miners in the district.

STATUTORY CONSTRUCTION — *grants to miners — implied right.* The grants made by congress in the mining law of July 26, 1866, should be liberally construed in favor of the grantee; and the grant of the right to occupy and explore the mineral lands of the United States carries with it the implied right to extract the precious metals found by the occupant and explorer.

RULES OF MINERS — *vested rights.* The right to occupy, explore and extract the precious metals in the mineral lands of the United States becomes vested in the party who locates these lands according to the local rules and customs of the mining district in which they are situated.

TITLE TO MINING CLAIMS — *rights of miners.* The fee in the land, on which mining claims are located, remains in the United States, but the rights of miners are incident to the fee and have been carved out of it.

STATUTORY CONSTRUCTION — *grant by congress for highways — compensation.* Section 8 of the general mining act of congress of July 26, 1866, grants to the public a right of way for the construction of highways over public lands, which have not been otherwise appropriated; but neither the county commissioners nor the territorial legislature can take land for highways in

which miners have acquired vested rights, without giving a just compensation for damages to those rights.

STATUTORY CONSTRUCTION — *reserved rights by congress — miners' customs.* The clause in section 1 of the general mining act of July 26, 1866, "subject to such regulations as may be prescribed by law," is a reservation of the right by congress to regulate by legal enactments the manner and conditions under which claims must be worked by miners. The clause in the same section, "subject also to the local customs or rules of miners in the several mining districts," relates to the rules, customs and regulations of miners regarding the location, user and forfeiture of mining claims.

VESTED RIGHTS OF MINERS — *compensation — highway.* Lands of the United States, in which miners have vested rights, cannot be taken for the public use for a highway, if there is no act of the legislature providing for a just compensation to the miners.

Appeal from the Third District, Meagher County.

THE judgment in this action was rendered in July, 1871, by WADE, J. The other facts are stated in the opinion.

G. G. SYMES and S. ORR, for appellants.

Persons mining on the public domain before the act of congress of July 26, 1866, were trespassers and could have no possessory rights. Yale on Water Rights, 331–334; *United States* v. *Gear*, 3 How. 120; *Cotton* v. *United States*, 11 id. 229. The act of congress of July 26, 1866, expressly reserves from possessory rights granted to miners the right of way over the public domain for roads. 14 U. S. Stat. 253, § 8.

The legislature can lay out and establish roads by an express act, or by delegating the power to inferior tribunals. The legislature of 1866 incorporated "The Eldorado and Diamond City Wagon Road Company." The law was annulled by congress and re-enacted in 1867. Acts 1867, 127. This made the road a public highway. In 1869 the legislature repealed the franchise and made the road a free public highway. Acts 1869, 112. The legislature of 1867 made all roads then laid out or traveled public highways. Acts 1867, 89. These acts make a legal public highway over the respondents' mining ground.

No compensation was required to be made to the owners of the mining ground. The government grants the right

of way to the community and expressly reserves from individuals any possessory right that would conflict with it. 14 U. S. Stat. 253, § 8.

Appellants' right to maintain a suit to prevent travel on the road is barred by the statute of limitations. Acts 1865, 467.

The alleged agreement of respondents' predecessors in interest with persons when the road was constructed, cannot affect the interests of the community, who have the right to travel the road. If this is not a lawful road, there is not a road in the Territory that may not be closed. The road was duly laid out by the county commissioners and the supervisor, respondent Smith, was lawfully empowered to keep the road in repair. Acts 1865, 501; Acts 1869, 112.

CHUMASERO & CHADWICK, for respondents.

Respondents were in possession and working their mining ground long before the road was thought of. The toll-road was incorporated after respondents had located and taken possession of the ground. Acts 1867, 127. Respondents gave the toll-road company the privilege of laying out and using the road over their ground until they wanted it for mining purposes.

Miners have always had an implied license from the government to mine for precious metals on the public lands. The act of congress of July 26, 1866, recognizes this right of miners. 14 U. S. Stat. 253. It recognizes these mining claims as property.

The taking of private property for public uses will be enjoined until provision for compensation be made by law and compensation paid. 5th Amend. U. S. Const.; *Bonaparte* v. *Camden & Amboy Railroad Co.*, Bald. 205; *Atkinson* v. *Philadelphia & T. Railroad Co.*, 14 Haz. Penn. Reg. 10.

There is no law in Montana providing for laying out roads. There is only one provision relating thereto. Acts 1865, 501, § 14, cl. 8.

The legislature had no power to declare by a repealing

enactment that the road, which had been laid out and used by the sufferance of miners, should be a public highway without providing compensation. Where compensation for land taken for a road by a county does not precede the taking, the entire action of the county authorities is void. *Johnson* v. *Alameda County*, 14 Cal. 106.

All statutory modes of divesting titles are strictly construed and must be strictly pursued. *Beasley* v. *Mountain L. Co.*, 13 Cal. 306; Sedgw. Stat. L. 319; Dwarrs on Stats. 611; *Mokelumne H. M. Co.* v. *Woodbury*, 14 Cal. 427. If the statute condemning land for road purposes is unconstitutional, or compensation is not tendered, a perpetual injunction against opening the road will be granted. *Gardner* v. *Newbury*, 2 Johns. Ch. 162; *Mokelumne H. M. Co.* v. *Woodbury*, 14 Cal. 427.

No road has ever been laid out over this ground of respondents by any authority except the act of the legislature which repealed the charter. This act is unconstitutional and void. The legislature cannot, by direct act, or by delegation of power to others, deprive any one of his property without compensation.

KNOWLES, J. This cause comes to this court on appeal from an order granting an injunction restraining the defendants from laying out and maintaining a highway over certain mining claims belonging to the plaintiffs. It appears from the record, that plaintiffs and their grantors have claimed and possessed a mining interest in these claims since A. D. 1865. That they are in possession of them now, and that they have expended quite a sum of money in opening and in preparing to work the same. That defendants, Ford, Keene and Sterling, are the county commissioners of Meagher county, and as such had laid out a road up Cement gulch, being that upon which plaintiffs' mining claims are situated, and over these claims. That the defendant Smith was a road supervisor, and, as such, was proceeding under the directions of the above-named commissioners to open said road. That there was granted by the legislative assem-

bly of this Territory, subsequent to the location of plaintiffs' mining claims, a charter to certain persons, to lay out and maintain a toll-road up said Cement gulch, and that, in pursuance of said charter, these persons did open and maintain such road. That a subsequent legislative assembly repealed the act granting this charter, and, by an act, declared this road a public highway.

The defendants claim, that by virtue of the provisions of an act of congress, passed July 26, 1866, entitled "An act providing for the right of way to ditch and canal owners, over public lands, and for other purposes" (see 14 U. S. Stat. at Large, 253), they were vested with the right to lay out and maintain this road. The section of said act which they claim grants them this right reads as follows:

SEC. 8. "That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The first question then presented for our consideration is, were the lands upon which these mining claims are situated fully public lands?

The same act which grants this right to construct highways over public lands, grants to citizens of the United States, and those who have declared their intentions to become such, the right to explore and occupy the mineral lands of the public domain, subject to such regulations as may be prescribed by law, and subject, also, to the local customs and rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States. 14 U. S. Stat. at Large, § 1, p. 253.

We hold, that this section of that act grants to the proper person an easement upon such of the mineral lands belonging to the public domain of the United States, as he may appropriate, in accordance with the local rules and customs of miners in the mining district, in which the same may be situated, there being at present no regulations prescribed by law to vary or limit these. There is no point presented in this case that would imply that plaintiffs did not hold their mining claims, in accordance with the rules and cus-

toms of the miners in the district in which the same are situated. They being in possession of them, it will be presumed that they hold them in accordance with such rules and customs, upon the same principle that the possessor of any real estate is presumed to be the owner thereof, until the contrary is shown.

This easement is one of a very extensive character, for it gives the owner thereof the right to occupy and explore such land. Being a right received by legislative grant, it should receive no narrow construction.

The rule may be stated as a general one, in respect to legislative grants in this country, that they should be construed liberally in favor of the grantee, and in such a manner as to give them a full and liberal operation, so as to carry out the legislative intent, where that can be ascertained. See 2 Washb. on Real Prop. 539. Considering the history of mining for the precious metals in the mineral lands of the United States, and the history of the passage of the act under consideration, it cannot be doubted that congress intended by it to legalize the mining upon the public domain for precious metals, which up to the passage of the same had been carried on in such a manner as to make those engaged therein trespassers as against the general government. We may assert, then, that the grant to occupy and explore the public mineral lands belonging to the public domain, carried with it, by implication, the right to take what was found by such exploration, namely, the precious metals; for, without this right, the grant would be of no utility to those it was intended to benefit. The only object any miner would have in occupying and exploring any mineral land, would be the extraction therefrom of metals therein contained. Without this right, the miner who does so would still be a trespasser against the general government. I am aware that in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, in relation to franchises, the supreme court of the United States held, that a legislative grant should be strictly construed, and that nothing could be derived by implication from such a grant. Yet, in relation to legisla-

tive grants of this character, I believe that court would be more liberal. Certainly, public policy would not dictate so narrow a construction. Yale, in his treatise on mining claims and water rights, maintains that this grant gives as extensive rights to the miner, in regard to extracting the precious metals from a mining claim, as those specified above. See Yale on Mining Claims and Water Rights, 355, 356.

This right to occupy, explore and extract from mineral lands the precious metals, is of a higher character than if created by what is termed a parol license, for it is given by an act of congress; and, hence, equivalent to a patent from the United States to the same.

"For the transfer, by the United States or by a State, of the title of land, no particular form is required. It may be done by special act of legislation, by a clause inserted in a treaty by the treaty-making power, or by patent issued by one authorized to represent the sovereignty." 2 Washb. on Real Prop. 240.

Again: "A grant may be made by law as well as by patent issued pursuant to law." 2 Washb. on Real Prop. 240.

Of course, this right to occupy, explore and extract the precious metals from the mineral lands belonging to the public domain is not unlimited. It is restricted by the local rules and customs of the miners of the district in which such land is situated. These rules and customs refer to the location, user and forfeiture of mining claims. When a miner locates a particular portion of mining land, in accordance with these rules and customs, then the grant from the general government to occupy, explore and take there from the precious metals, accrues to such miner over the ground located. The effect of this statute, then, is to grant these rights over the ground located, in accordance with such rules, to as full an extent as if the land had been designated in the law.

While the general government then holds the fee in the land upon which these mining claims are situated, it has

parted with an incorporeal hereditament in the same, that is, the right to occupy, explore and extract the precious metals therefrom; and these rights have become vested in the plaintiffs, by virtue of a grant from the general government; hence, these mining claims are no longer to the full extent public lands. The title in fee is, but these rights, which were incident to the fee, have been carved out of it, and are no longer government property but that of the plaintiffs, and it is property which the law will protect. The use to which the defendants would devote this property, would destroy plaintiff's rights. The section of the act under which defendants claim their rights are granted does not devote any particular portion of the public domain to a highway. It gives a general right to the public of a right of way for that purpose over public lands, and should be construed only to offer to devote to that use any lands belonging to the general government, not reserved for public uses, that the public might, through its proper officers, select. Until the public then accepts the offer made, and seeks to devote some particular portion of the public domain for a highway, no rights accrue to the public over such lands. See *The City and County of San Francisco* v. *David Calderwood et al.*, 31 Cal. 585. No rights could have accrued to the public in the land, upon any portion of Cement gulch, until either the legislature declared the toll-road up the same a highway, or until the said county commissioners sought to locate one there. We have seen, however, that before either of these events transpired, the rights of the plaintiffs had become vested. No greater rights could accrue to the public in these lands, than the government had at the time the public accepted the offer made in one of the ways above specified. The government, as we have seen, had parted with an easement to plaintiffs. Neither the defendants as county officers, or the Territory, or even the general government, could devote this ground to the use of a highway, without giving the plaintiffs a just compensation for all the damage done their rights.

The defendants insist that any miner who locates a mining

claim does so subject to right of the public under the section of the law referred to above to construct a highway over the same. There is no reservation of this kind in the grant to the miner. The clause, "subject to such regulations as may be prescribed by law," reserves only the right to regulate the manner and conditions under which miners must work their claims by legal enactments. The clause, "subject to the local customs or rules of miners in the several mining districts," refers evidently to the rules, customs and regulations of miners in relation to the location, user and forfeiture of mining claims. By no rule of legal construction that I am aware of can these clauses be made to refer to a reservation of a right to the public to construct a highway over located mining claims. The proper construction of the law upon these subjects is, I think, that miners have the right to occupy and explore unappropriated public mineral lands; that the public have a right to an easement for a highway over the unoccupied public domain, and that whichever is prior in time is prior in right. It is as inconsistent for the public to claim a right of way over an appropriated mining claim without giving the owner thereof a just compensation for his rights as it would be for a miner to claim the right to appropriate for mining purposes a portion of the public domain which had been devoted to the use of a public highway. The statute does not, by express terms, or by implication, make either of these rights superior to each other. There was no attempt on the part of the defendants to have the rights of plaintiffs sequestered for the benefit of the public upon giving to them a just compensation therefor. As far as we have been able to ascertain there is no provision in the statutes in this Territory which provides for the paying of a just compensation for private property which is sought to be devoted to a public use for a highway. Until there is some provision for this I do not see how private property can be devoted to the use of the public for such a purpose, notwithstanding the necessity for such an appropriation may be very great. It would seem that it was a condition precedent that a just

compensation should be given for private property before it can be taken for a public use.

It does not fully appear that the defendants claim that the public was subrogated to the rights of those persons who had constructed the toll-road over these claims. However, if they do the public could receive no greater rights than these parties had. It does not appear that they had any rights but the permission to construct their road over these claims and use it during the pleasure of the plaintiffs. The charter given to those persons could have given them no right to construct their road over these claims so as to damage the rights of plaintiffs, for a provision in a charter granting such a right would be the transferring of the property of one set of persons to another, and would be void as contravening the constitutional provision that no one can be deprived of his property without due process of law.

For these reasons the order of the court below is affirmed.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1872, HELD IN VIRGINIA CITY.

Present:

HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. JOHN L. MURPHY, }

KEMP, respondent, *v.* MCCORMICK et al., appellants.

PLEADING — *abbreviation of name of party.* A party can be described in a pleading by a known and accepted abbreviation of his christian name.

ESTOPPEL — *denial of name — promissory note.* The maker of a promissory note is estopped from denying his name or that of the payee as it is written in the note.

PLEADING — *counter-claim to joint debt — promissory note.* In an action on a promissory note against two makers, who are jointly liable, one of them cannot plead as a counter-claim an individual debt due from the payee to himself, unless he alleges that the payee is insolvent, or an equitable ground of defense.

Appeal from the Third District, Lewis and Clarke County.

KEMP commenced this action in October, 1871, and described himself in the complaint as "Alex. Kemp," and the defendants as "Jno. McCormick" and "Wm. H. Taylor." The cause of action was the following instrument:

"$650. HELENA, M. T., *Mar.* 1*st*, 1871.

"On the first day of June next we promise to pay Alex. Kemp or order the sum of six hundred and fifty dollars, for value received, with interest after due at the rate of twc per cent per month till paid.

"JNO. McCORMICK,
[Stamp.] "WM. H. TAYLOR."

Kemp was described in the summons as "Alex. Kemp."

In November, 1871, Kemp filed an amended complaint and was described as "Alexander Kemp."

The answer of John McCormick set forth that there was a variance between the original complaint and summons, and the amended complaint, in the description of the plaintiff as "Alex. Kemp" and "Alexander Kemp;" and that the note was made to "Alex. Kemp," while the amended complaint was filed in the name of "Alexander Kemp;" and that his name was not "Jno. McCormick," but "John McCormick."

The other facts appear in the opinion.

The court, WADE, J., rendered judgment in favor of Kemp on the pleadings, and McCormick appealed.

CHUMASERO & CHADWICK, for appellants.

The court erred in striking out the answer. The summons did not state correctly the parties to the action. A party is bound to know his own name, and must sue and be sued by it. The misnomer is properly pleaded by way of answer. Respondent could have amended under section 68 of the practice act. If the answer was not true, respondent could have taken issue by replication.

The answer sets up a partial defense. It is claimed that

the prayer for relief is too broad. The facts and not the prayer settle the relief to be granted. *Rollin* v. *Forbes*, 10 Cal. 299; *People* v. *Merrill*, 26 id. 336; Civ. Prac. Act, § 147; Voorhies' Code, § 275.

An answer is not frivolous if it sets up facts that may constitute a defense, if properly averred. Voorhies' Code, 298, note *c*. The decisive question is this: Does the counter-claim or set-off in the answer constitute facts entitling the appellant to recover money from respondent in a separate answer?

CULLEN & COMLY, for respondent.

It is proper to describe a party by an abbreviation of his christian name. 1 Greenl. Ev. 11, 8, note 7; 5 U. S. Dig. 51, title Name. The misspelling of appellant's name comes under the principle of "idem sonans." 1 Bouv. L. D. 596. Appellant, having signed his name as alleged, is estopped from denying it. 2 Bouv. L. D. 198, § 11.

A claim due to one only of several defendants, sued upon a joint liability, cannot be set up as a counter-claim in a suit upon the joint debt. *Peabody* v. *Bloomer*, 3 Abb. Pr. 353; Waterman on Set-offs, 280–282; *Woods* v. *Harris*, 5 Blackf. 585; *Stone* v. *McConnell*, 1 Duvall, 54; *Howard* v. *Shores*, 20 Cal. 277.

MURPHY, J. This is an action on a promissory note executed by McCormick and one Taylor, and payable to Kemp.

A demurrer was filed to the original complaint, which was confessed, and an amended complaint filed, to which defendant McCormick filed a separate answer, setting up the misnomer of the plaintiff and defendant, and also a set-off or counter-claim.

Plaintiff filed a motion to strike this answer from the files and for judgment on the complaint as by default, on the ground of being frivolous, sham, irrelevant and presenting no defense.

This motion was sustained, and judgment in favor of

plaintiff entered by the court below, to which defendants appealed.

1. As to the question of misnomer, raised by the record, we hold that it is sufficient to describe a party to an action by any known and accepted abbreviation of his christian name, and that the defendant, having signed his name to the note in question with such abbreviation, is now estopped from denying it.

2. As to the question of set-off or counter-claim also raised by the record:

Can a claim, due to one of several defendants, be set up as a counter-claim in a suit against such defendants upon a joint debt or liability?

We think not in this instance.

The law of set-offs in this Territory is regulated by the 47th section of our civil practice act. Laws of 1867, 143.

It provides, that the claim to be set off, "shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action," etc.

This is the same as the California statute on the subject of set-off, and in a judicial construction of the same (20 Cal. 281), the converse of the proposition here was there held, where a joint debt was sought to be set off against an individual debt.

And upon the same principle an individual debt cannot be set off against a joint debt or liability.

The demand sought to be thus set off must be due to all of the defendants, before it can be interposed as a set-off, in the absence of express provisions of the statute to the contrary, unless it should be upon purely equitable grounds, by averment and proof of insolvency, etc., which has not been attempted in this case.

There is no error in the action of the court below in striking out the answer and rendering judgment upon the complaint

The judgment is affirmed.

Judgment affirmed.

COADY, appellant, *v.* REINS, respondent.

STATUTE OF LIMITATIONS — *malpractice — action against physician for damages.* In this action to recover damages for the unskillful treatment of a fractured arm, the gist of the action is the negligence of the physician, and the statute of limitations begins to run from the time of the alleged negligence.

EVIDENCE — *injury to the person.* In proving the actual injury caused by the unskillful treatment of a patient by a physician, it is competent to show all the facts resulting from the injury, from the time the right of action accrued to the verdict.

STATUTORY CONSTRUCTION — *statute of limitations — time enlarged.* The act of the sixth legislature amending "An act concerning limitations," approved February 9, 1865, governs all cases in which the right of action existed at the time of its passage under the first act, approved February 9, 1865, and enlarged the time within which the plaintiff could enforce her remedy from February 28, 1870, when she was barred by the first act, to February 28, 1873.

STATUTORY CONSTRUCTION — *statute of limitations — validity of.* The act of the sixth legislature amending the "Act concerning limitations," approved February 9, 1865, relates to the remedy, is prospective in its effects and does not violate any vested rights.

POWER OF COURTS — *cannot legislate — limitation.* Courts cannot legislate and exempt parties from the operation of a statute of limitation, if the legislature has not made any exception.

Appeal from the Third District, Lewis and Clarke County.

THIS action was heard by the court, WADE, J., in August, 1871, and judgment rendered for Reins on his demurrer to the complaint. The facts are stated in the opinion.

G. G. SYMES and WARREN & SANDERS, for appellant.

This action was limited by the original statute of limitations to two years from the time the cause of action arose. Acts 1865, 467, § 8. This was amended, and the time was extended to five years. Acts 1870, 62.

The statute in force at the time the action was brought governs it. The old law was expressly repealed by the amendment of 1870. The complaint shows continuing damages resulting after the limitation had ceased to bar recovery under the old law in force, when the act from which damages resulted was done.

A plea of the statute of limitations is a plea of the forum,

affects only the remedy, and does not affect the right, unless the time is unreasonably shortened. *Ogden* v. *Saunders*, 12 Wheat. 350; 1 Bouv. Inst. 334; 2 Harrison's Dig. 3737; Ang. on Lim. 63; *Call* v. *Hager*, 8 Mass. 429; *Hayward* v. *Judd*, 4 Minn. 487; Sedgw. on Stat. Law, 659.

The statute is prospective. It applies to all suits brought after its passage, and affects only the remedy. *McCrea* v. *Craig*, 23 Cal. 522. The time when the contract was made, or act done, under which the cause of action arose, is immaterial. *Ross* v. *Duvall*, 13 Pet. 64; *Bank of Alabama* v. *Dalton*, 9 How. (U. S.) 527; *Patterson* v. *Gaines*, 6 id. 602; *Loring* v. *Allen*, 9 Cush. 70.

In actions on the case for negligence the statute of limitations begins to run from the time the consequent damages accrue. Ang. on Lim. 299–319; Starkie on Slander 473, 474; *Dyster* v. *Battye*, 3 Barn. & Ald. 448; *Fisher* v. *Pond*, 1 Hill, 672.

Where damages continue, only those can be recovered which have accrued within the time of limitation. Ang. on Lim., § 307.

There was no limitation law in force at the time the suit was brought, except the amendment of 1870.

CHUMASERO & CHADWICK, SHOBER & LOWRY, and E. W. TOOLE & J. K. TOOLE, for respondent.

The statute of limitations commenced to run from the time the act was done by respondent. Appellant cannot avail himself of the continuando in his complaint. Ang. on Lim., § 141. The statute does not run from the time of the consequent injuries to appellant. *Argall* v. *Bryant*, 1 Sandf. 98.

The statute of 1865 governs the case and not the act of 1870. To give the last act force and application to this cause would give it a retroactive operation. Laws can only attach to future action. They cannot attach to conduct prior to the creation of the law. The act of 1870 was not in existence when the cause of action accrued in this case. The cause of action accrued on February 28, 1868, and, under the law then in force, the suit must be commenced

within two years, by February 28, 1870, or it was barred. Acts 1865, 466, 467, §§ 1, 8; Acts 1870, 62.

The complaint was filed April 12, 1871, and the rights of the parties cannot be determined by the act of 1870. *Thompson* v. *Alexander*, 11 Ill. 55. No statute should be so construed as to give it a retrospective operation. *Battles* v. *Forbes*, 18 Pick. 533; *Dash* v. *Van Vleeck*, 7 Johns. 477. Statute should not be construed to act on rights already existing. *Johnson* v. *Burrell*, 2 Hill, 238; *Woods* v. *Dudley*, 11 Paige, 403.

MURPHY, J. This suit was commenced on the 12th day of April, 1871, by Coady, to recover damages against Rein, for unskillfulness, etc., as a physician and surgeon, in setting and treating her fractured and dislocated arm and elbow, on the 28th day of February, 1868.

On the 11th day of July, 1871, the defendant filed a demurrer to the amended complaint, setting forth as the grounds thereof: 1. That the action was barred by the statute of limitation; and, 2. That the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was sustained and judgment for costs rendered against the plaintiff by the court below, from which she has appealed to this court.

But the only question necessary for us to consider in this connection is, is the action barred by the statute of limitation?

There have been but two acts regarding limitations passed in the Territory, in February, 1865, and January, 1870, respectively.

The latter amended section 8 of the former, embracing actions of this nature, and repealed all former acts in conflict therewith.

By the former, actions of this character were limited to two years from the time the cause thereof accrued; by the latter, to five years.

Now the question is, which act is to govern in this case. But, when did the right of action accrue? let us first inquire

The gist of the action in this instance is the negligence and unskillfulness, or breach of duty as laid in the complaint, and not the injury or damage consequent thereon.

If such action were commenced immediately upon a person becoming chargeable in such a case, it is probably true that no more than nominal damages could be recovered, yet it is clear that proof of actual damages may extend to and embrace facts occurring and growing out of the injury, even up to the verdict itself.

But the statute in cases of this nature begins to run, regardless of the form of action, whether case or assumpsit, from the time of the negligence or breach of duty.

And in this case, under the act in force at the time of said negligence or breach of duty, it must be held to have commenced to run from the said 28th day of February, 1868.

And since it is true that, at the commencement of this action, the time limited under the act in force when the cause thereof accrued, had expired, it is insisted by respondent that that fact is conclusive of this case, and therefore the suit is barred.

But it must be borne in mind that said act had been repealed before said time, as limited under it, had expired, and before the action was barred. And, also, that another and new act, extending and enlarging the time within which such actions could be commenced and prosecuted, had gone into full force and effect, while the right of action still existed under the old and original act. And as the statute of limitations applies only to the remedy, the subsequent act would have the effect, on coming into operation, to take up and carry forward for the length of time thus provided all the then valid subsisting causes of action.

And it is also contended by respondent that to apply said last act to the case at bar would give it a retroactive or retrospective operation.

But would such be the effect in this instance?

It would doubtless be retroactive when applied to suits having been begun and pending when it was passed or took effect. But in this case no action had been begun or was

pending when it went into operation; only the right of action was in existence at that time.

And is it retrospective in its character?

The very words are, "an action upon an account or other contract, obligation or liability not grounded upon an instrument of writing, *shall* be commenced within five years." It is plain that it relates only to the remedy, and is prospective in every sense.

And it seems to have been the uniform practice of legislatures, and that, too, without any well-grounded objection, in enacting statutes of limitations, to make them apply as well to causes of action which have already accrued, as those which may thereafter accrue, if sufficient time be allowed between the time the act takes effect and the period fixed for the limitations, to afford a full and ample opportunity to all persons having such causes of action, to commence their suits. See *Loring, Judge, etc.*, v. *Alline*, 9 Cush. 68.

And by the operation of the subsequent act, in its application to this case, we see that the right of action is neither extinguished nor the time within which suit must be brought to enforce it unreasonably shortened, but is expressly extended and enlarged.

Of course it could not be construed to apply to causes of action which have accrued more than five years previous, to the time limited in said act, without a violation of vested rights.

But in this case, about two years only having elapsed, no vested rights under the act are in any manner interfered with.

And the fact must not be overlooked, that the act in question makes no exception of this class of cases.

The legislature, therefore, having made no exception from the operation of its provisions, of parties suing under such circumstances, the courts, of course, can make none. Such action by the courts would be legislating, would be unwarranted, beyond their province, and be error. See *Bank of Alabama* v. *Dalton*, 9 How. 528, 529, and cases cited.

The statute, then, that must determine the right of the plaintiff to bring this action, is the one in force when the same was brought. See *Patterson* v. *Gaines*, 6 How. 601, etc.

And as the time under the statute in force (January, 1870) when this action was commenced had not expired, it was and is not barred, and the court below committed error in sustaining the demurrer aforesaid on that ground.

The judgment of the court below is reversed and the cause remanded.

Exceptions sustained.

COLUMBIA MINING COMPANY, respondent, *v.* HOLTER et al., appellants.

PRACTICE — *motion for rehearing — equity — supersedeas.* The motion for a rehearing of an equity case by this court does not operate as a supersedeas, and the court below can enter a decree in accordance with the remittitur and mandate of this court, while the motion is pending.

PRACTICE — *stay of judgment — motion.* A motion for a new trial in an action at law does not stay the execution of the judgment.

REHEARING — *rule of court — terms of continuance.* A party can make a motion for a rehearing under a rule of this court. It is not a right given by statute and this court can prescribe the terms on which a continuance of the argument on the motion is granted.

PRACTICE — *remittitur recalled or stayed by justices.* The justices of this court, on a proper application in vacation or term time, can recall or stay a remittitur and mandate that have been erroneously issued out of this court.

PRACTICE — *granting of rehearing.* A rehearing in an equity case will not be granted after the court below has entered the decree of this court according to its mandate and remittitur.

MANDATE OF THIS COURT. The court below must obey the mandate and remittitur of this court.

PRACTICE — *rehearing — reversal of decision.* On a motion for a rehearing, this court will rarely, if ever, reverse its first decision, unless it has overlooked some decisive question, or the decision conflicts with a statute or controlling decision.

Appeal from the Third District, Lewis and Clarke County

THE facts are stated in the opinion. The decree was entered by the court, WADE, J.

E. W. TOOLE & J. K. TOOLE, for appellants.

By the motion for a rehearing in the original case, and the continuance of the same, the jurisdiction over the cause was retained in this court. No judgment could be rendered in the court below until the motion for a rehearing had been disposed of. This is the only question involved in the case. The motion for rehearing and its continuance operated *per se* as a supersedeas.

W. F. SANDERS and CHUMASERO & CHADWICK, for respondent.

The continuance of the argument on the motion for rehearing was granted "without stay of proceedings." The court below was powerless to disobey the mandate of this court. If the motion operated as a supersedeas, appellants have not saved that error.

There is a distinction between cases at law and equity. At law the motion for a new trial does not operate to stay the execution of the judgment. In equity cases, this court can direct the terms on which its orders shall be made for continuing a rehearing.

A rehearing will not be granted in equity cases, if it has been remitted to the court below to carry into effect the decree of this court, and a subsequent appeal brings up only the proceedings after the mandate. *Browder* v. *McArthur*, 7 Wheat. 58.

If this court should reverse its former decision, all decrees would fall as a consequence and no injustice would be done. *Wambaugh* v. *Gates*, 8 N. Y. 138.

MURPHY, J. This suit was originally brought by the Columbia Mining Company against Anton M. Holter and others, for damages, for the diversion of certain water from plaintiff's mill, etc., and for an injunction.

There was a verdict and judgment for defendants below,

and also a decree dissolving the temporary restraining order, from which plaintiff appealed to this court.

The appeal was regularly heard at the last January term, the judgment below reversed, the order dissolving the temporary restraining order set aside and the cause remanded, with instructions to set aside the general verdict of the jury, and, upon the pleadings and special findings, render judgment in favor of plaintiff for nominal damages, and enter a decree granting a perpetual injunction as prayed for.

At the same term a motion of defendants, for a rehearing, was permitted to be filed and continued, the order of continuance entered *nunc pro tunc*, at the last term, specifying "without stay of proceedings."

At the following March term of the court below, on presentation of the remittitur and mandate, the judgment aforesaid of this court was executed as directed, to which defendants excepted, and have appealed to this court.

There is no complaint that the decree of the court below does not conform to the mandate of this court, nor that any misconduct or irregularity whatever was committed. The only error assigned is, that the court below entered a decree pursuant to the remittitur and mandate aforesaid, while the motion for a rehearing was pending above.

And the only question for us to consider now is, did this court, by reason of said motion, retain jurisdiction over the case so that the court below could not proceed to carry out the judgment above, according to its mandate, or did said motion operate *per se* as a supersedeas.

It is a rule of law that a motion for a new trial at law, which is a statutory right, does not operate of itself to stay the execution of a judgment, but requires a special order to that effect, on such terms as the court may prescribe.

And there is no substantial difference between a rehearing in equity, which opens the decree afresh, and places the case before the court for trial anew, and a new trial in a case at law tried and decided by the court.

A motion for a rehearing in this instance, not being even a right prescribed by statute, but simply by a rule of this

court, by a parity of reasoning, would not *per se* operate as a supersedeas, or stay of the remittitur and mandate, and not without a similar order.

And in this case it appears that the argument on the motion was, on the application of the defendants themselves, continued, and then only on the express condition that it should not operate as a stay of proceedings.

And this court having the right to prescribe the terms upon which such orders are made, and the continuance being allowed at defendants' own instance and request, they could not avail themselves of the favor and afterward repudiate the terms upon which it was granted.

But if it had operated as a supersedeas, the defendants have not saved, but, by their laches, waived the error.

Their remedy, in that event, would have been by application to the justices of the supreme court, who, in vacation as in term time, have authority over the writs of this court, and could have recalled the mandate and remittitur, or stayed the same till a rehearing could have been had.

A rehearing will not be granted in an equity cause, after it has been remitted to the court below, to carry into effect the decree of the court above, according to its mandate. And a subsequent appeal for supposed error in carrying into effect such mandate, brings up only the proceedings after the mandate. 5 Curtis' U. S. Sup. Ct. Decis. 220.

In this case, there being a positive direction, on filing and continuing the motion for a rehearing, that it should not stay proceedings, the remittitur and mandate were regularly and properly issued.

The mandate was the imperative command of a supervisory to a subordinate court.

The court below was powerless to disobey.

Disobedience would have been error, and, if admitted, the authority of this tribunal as a supreme and supervisory court would be annihilated.

If afterward, however, on motion for a rehearing, this court should reverse its former decision, which would rarely, if ever, be done, except upon some question deci-

sive of the case, duly submitted by counsel, but overlooked by the court, or the fact that the decision was in conflict with an express statute or a controlling decision, to which the attention of the court had not been directed, all decrees in pursuance thereof would, as a natural consequence, fall with the decision, the authority under which they were made.

And, in that event, defendants would at least have their remedy by action to recover back the money collected under the same.

Therefore we hold, that the motion for a rehearing did not operate as a supersedeas, and that the court below committed no error in entering the decree in conformity to the remittitur and mandate from the court above.

The action of the court below in carrying into effect the judgment of the supervisory court is sustained, and the decree affirmed.

Judgment affirmed.

CAROTHERS, respondent, *v.* CONNOLLY, appellant.

STATUTE OF FRAUDS — *verbal promise to pay debt of another.* The verbal promise of a party, who has a claim against a ditch, to pay the lien of another against the ditch, is not within the statute of frauds, and may be enforced in law, if the main purpose of the promise is to protect the private interests of the promisor, and the other party, in consequence of this promise, gives up his lien on the property and fails to sue and collect his debt.

Appeal from the Second District, Deer Lodge County.

THIS action was tried in May, 1871, by a jury, who returned a verdict for Carothers, and the court, KNOWLES, J., entered judgment against Connolly.

The facts appear in the opinion.

The statute of the Territory, relating to the action, is as follows: "In the following cases, any agreement shall be void unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged thereunto: First. Every agreement that by the terms is not to be performed within

one year from the making thereof. Second. Every special promise to answer for the debt, or default or miscarriage of another."

SHARP & NAPTON, for appellant.

The only question at issue in this case is, whether or not there was such a promise made by appellant to respondent, as to take it out of the statute of frauds. Appellant maintains that there was not. What consideration was there for appellant's promise, if the foreclosure of respondent's lien would not injure him?

The burden of proving a valid legal promise is upon the respondent. That he failed to do, so long as there was no benefit gained by appellant in having the lien forfeited. There was none, because only two members of the firm sign the deed to Connolly & Stuart, and consequently their lien was only on a portion of the property, and they could have compelled the respondent to satisfy his lien out of the balance of the property. If this promise had been reduced to writing the consideration would have been sufficient for a guaranty. 2 Pars. on Cont. 9–11.

J. C. ROBINSON, for respondent.

Appellant's promise is taken out of the statute of frauds. He was benefited and respondent injured by it, either of which would support the promise. 1 Pars. on Cont. 366–369; 2 id. 306. Appellant had an interest in the ditch when he made the promise. 3 Pars. on Cont. 25.

WADE, C. J. This suit is brought on an alleged promise by defendant to pay a debt of the plaintiff against the Key Stone Ditch Company, and it is claimed by defendant that this promise being a verbal promise to pay the debt of another is within the statute of frauds and therefore void.

The pleadings and the evidence in this case show substantially this state of facts. In the month of December, 1871, the Key Stone Ditch Company were indebted to the plaintiff and two other persons, doing business under the name and style of Carothers & Co., in the sum of $151.50, for lumber, before that time delivered to the ditch company

at their special instance and request; that to secure the payment of this indebtedness Carothers & Co. filed a lien upon the ditch property on the 9th day of December, 1867; that in the year 1868 Carothers & Co., for a valuable consideration, assigned and delivered to the plaintiff their interest in said debt and lien; that prior to the 1st day of June, 1868, the defendant, Connolly, became the owner of the ditch property, or at least that he became the owner of a claim against the same in the sum of more than $5,000, and that while the defendant was so the owner of said property, or the owner of said claim against the same, in consideration that said plaintiff would give up, release and forfeit to said defendant his said lien upon said property, and that plaintiff would forbear to sue and foreclose the same, he, the defendant, then undertook and promised to pay plaintiff said debt and demand of $151.50, and that, in pursuance of said agreement of the defendant, the plaintiff did give up said lien, and did release the same to the defendant, and did forbear to sue and collect the same out of said property, and thereby lost his lien and claim against said property, and that his debt remains due and unpaid.

The testimony also shows that the defendant, being the owner of said claim against said property, was interested in having the other demands against said property paid off and canceled, and that for this purpose, and, further, to secure his own debt against said property, he had paid the claim of one Volbrecht and of one Stephens thereon, and has taken a conveyance or assignment of said claims to himself.

Being thus interested in the ditch property to the extent of his claim or demand against the same, he makes the promise to the plaintiff as above set forth.

Is this promise, so made, within the statute of frauds, and void?

It is obvious from the situation of the parties and the property in question, at the time this promise was made, that the enforcement of the lien of the plaintiff, and the collection of his debt out of this property, would so far, and

to the extent of the plaintiff's claim, have decreased and lessened the security of the defendant's debt, so that his promise and agreement to pay the debt of the plaintiff was a promise made for his own interest and for his own benefit, and to prevent a sacrifice of the property, by a forced sale, upon proceedings to foreclose plaintiff's lien. The promise and undertaking of the defendant, therefore, was not for the benefit of the plaintiff. The plaintiff's debt was secure beyond question, and this promise of the defendant was purely and solely for his own accommodation. It was made to further secure the defendant, and to place the ditch property under his sole control.

It was a promise to pay the debt of another, and not in writing, but the leading object of the promisor was to subserve and promote some interest or purpose of his own. Such a promise is not within the statute of frauds. The statute is designed to prevent frauds and perjuries, and not to engender them, and it would outrage every principle of justice and fair dealing to permit any defendant to escape the consequences of his promise, made to further his own interests, ends and purposes.

Wherever the main purpose and object of the promise is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another.

If a creditor has a lien upon certain property of his debtor to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay the debt, in consideration of the creditor relinquishing his lien, this promise is not within the statute. 3 Pars. on Cont., §§ 24, 25; *Nelson* v. *Boynton*, 3 Metc. 396; *Williams* v. *Leper*, 3 Burr. 1886; *Alger* v. *Seville*, 1 Gray, 391.

The judgment in the court below is affirmed.

Judgment affirmed.

ISAACS, respondent, *v.* MCANDREW et al., appellants.

SERVICES — *special contract — absence of employee.* A servant, who is employed under a contract for a certain time, at a fixed price, cannot recover on the contract for the services he has rendered, if he has left or been compelled to leave his employers through their conduct, before the stipulated time expires.

SERVICES — *effect of special contract — time of service.* A party, who is employed under a written contract, as a superintendent of mines for five years, at a salary of $4,000 per year, but in which no time for its payment is fixed, must perform services for the period of five years, before he can bring an action for any part of his salary.

SERVICES — *time of payment — salary.* If a written contract does not fix the time for the payment of a salary to a servant, who is to work for five years, at a certain salary per year, the law will establish such time at the end of the five years.

SERVICES — *entire contract — remedies — party prevented from performing contract.* A party who is prevented from performing an entire contract by the other party has three remedies; he may keep himself ready, willing and able to perform the contract until it expires, and then sue on the contract, or sue upon the *quantum meruit* for what his services are actually worth, or sue for damages for breach of the contract by the other party.

CONTRACT — *charge on business — personal liability.* An agreement that the traveling and living expenses of a superintendent of mines shall be a charge to and borne by the joint property and business, makes them liens upon such property and business, but does not create any personal liability until the remedy against the property has been exhausted.

STATUTORY CONSTRUCTION — *act prescribing the rate of interest* Interest is a creature of the statute; and, under the laws of this Territory, the payment of interest for money paid, laid out and expended for another, cannot be enforced unless it is averred and proved that there has been unresonable and vexatious delay.

PRACTICE — *finding by the jury set aside — services.* A finding by the jury, that a party has performed services for one year, under a contract requiring him to superintend mines in this Territory, will be set aside, if the evidence shows that he left the Territory before the year expired.

CONTRACT FOR MONTANA CURRENCY CONSTRUED — *salary for services.* Under a contract, which provides that a salary for services shall be at the rate of $4,000 a year, in Montana currency, allowing greenbacks to be worth 90 cents of the dollar of said currency, the amount of such salary is $4,000 per year.

CONTRACT — *place of performance and demand.* Under a contract that is made in New York to be performed in Montana, in which the place of payment for services is not fixed, a demand for payment must be made in New York, if the employers have their domicile there.

CONTRACT — *rate of interest after demand for payment for services.* In an action to recover for services performed in Montana, under a contract made in New York, which does not fix the rate of interest, if the payment for services is refused after a demand therefor in New York, the rate of interest would be that prescribed by the laws of this Territory.

HUSBAND AND WIFE—*void contract and judgment.* A contract by which a party agrees to perform services for three persons, one of whom is his wife, and a judgment obtained thereon, are void at common law as between the husband and his wife.

PRACTICE—*withdrawal of counter-claim.* It is not error for the court to refuse to allow a party to withdraw his counter-claim, after the testimony has been closed and while the court is instructing the jury, unless manifest injustice would result to the rights of the parties.

Appeal from the First District, Madison County.

THIS action was tried in November, 1869, by a jury, who returned a general verdict for Isaacs, on which the court, WARREN, J., rendered judgment.

Isaacs was restrained by an order of the court, in a suit in which McAndrew and another were the plaintiffs, from acting as superintendent of mines under the contract set forth in the opinion, from January 7, 1868, to September, 1868. It appeared from the evidence that the contract had never been dissolved or canceled by the parties; and that Isaacs testified that he notified McAndrew in New York city, in April, 1868, that he had come there to make a settlement with appellants, at the request of their agent in Montana, and that McAndrew then said that no person had any authority to so notify him to appear.

The other facts appear in the opinion.

W. F. SANDERS, for appellants.

Respondent could not claim over $4,000 per annum, with interest, as damages. The agreement to pay $4,000 limits the sum to that amount, but the judgment could not be for dollars in "Montana currency."

There was no agreement to pay until the close of the term of service, February 2, 1872. No liability had accrued under the first cause of action when judgment was rendered. No interest could be claimed under the statute. Acts 1865, 535. There was no allegation that these moneys were withheld by an unreasonable or vexatious delay.

The liability of appellants, under the second and third causes of action rests upon the last clause of appellant's letter of March 9, 1867. This clause was *nudum pactum.* It

was an offer to give, which could not be enforced as a legal liability. It was an offer to make the expenses a charge on the property and business, and created no personal liability. The only method of enforcing them would be by proceedings in equity to subject the property to their payment.

Respondent was discharged: whether for good cause or no makes no difference. He was discharged three months before the year expired. The jury found he was working in Montana under the contract, while he was actually in New York. The jury did not find that respondent was able to perform his part of the contract. Respondent went to New York by no one's authority.

There should have been a demand for currency, and a refusal to pay it. There should have been an allegation of acceptance by respondent of the proposition in the letter of March 9, 1867.

The stipulation, that respondent was to be paid at a certain rate per year, is not an agreement that the salary shall be paid at the end of the year. *Davis* v. *Maxwell*, 12 Metc. 289; *McMillan* v. *Vanderlip*, 12 Johns. 165; *Jennings* v. *Camp*, 13 id. 94; *Reab* v. *Moor*, 19 id. 337. Respondent could not collect any thing on the contract until, by its terms, the time had expired. He could sue for damages for refusing to employ, and not for wages before they became due.

The moneys named in the second and third causes of action were not paid at the instance or request of appellants.

Respondent neglected his duty and violated the orders of his employers and his contract of service. He was on the Missouri river one month, and neglected the business of his employers. Respondent could not delegate to another a personal trust. Respondent removed appellants' mill without authority, and squandered appellants' money in an untested and unimproved district. Respondent brought suits in names of appellants against their wishes. Respondent's letters and reports to appellants show incompetency, deception and fraud.

The court erred in refusing to allow appellants to withdraw their counter-claim. The court erred in refusing to instruct the jury that respondent must prove that he performed work for the whole year in order to recover.

Respondent was obliged to demand his pay in New York before appellants would be liable. The Montana currency was deliverable in New York, and an averment of demand there was essential. 2 Pars. on Cont. 583. Nothing was due respondent until February 2, 1872, or April 1, 1872.

The court erred in refusing to instruct the jury as to what constitutes negligence, and put a wrong construction on the letter of March 9, 1867. *Brown* v. *Huger*, 21 How. Pr. 305; Hilliard's New Trials, 250. The court refused to charge that desertion by respondent of appellants' business was cause for discharge. *Zabriskie* v. *Smith*, 13 N. Y. 338.

G. G. SYMES, S. WORD and H. N. BLAKE, for respondent.

Respondent testified that he worked as superintendent for appellants from April 1, 1867, to April 1, 1868; that he was to receive the salary mentioned in the letter of March 9, 1867, and expenses from New York to Montana, and living expenses in Montana; and that he worked faithfully for appellants. This evidence was not disputed by appellants.

This appeal is taken from an order overruling a motion for a new trial. There was no statement on the motion for a new trial, but the bill of exceptions contained a portion of the evidence. There being no such statement as the statute requires, this court cannot reverse the order overruling the motion for a new trial on the ground that the evidence is insufficient to support the verdict. Civ. Prac. Act, § 194. The weight of all the evidence in the exceptions is in favor of respondent. There is a conflict of evidence, and the court will not reverse the judgment or disturb the verdict. *Oullahan* v. *Starbuck*, 21 Cal. 413; *Wilcoxson* v. *Burton*, 27 id. 232; *Wilkinson* v. *Parrott*, 32 id. 102.

The only questions to be considered are the rulings of the court during the trial. The letter of March 9, 1867, was properly admitted in evidence. It fixed the salary of re-

spondent, and related to the issues tried by the jury. It shows that certain expenses of respondent were to be borne by appellants.

The refusal of the court to allow appellants to withdraw their counter-claim was not error. It is the intention of the law that accounts between litigants shall be settled in the same suit. If parties insist on a counter-claim during the trial, they should not be allowed to withdraw it while the court is charging the jury.

The instructions of the court were applicable to the issues formed by the pleadings and the points relied on by appellants. They fully present the appellant's side of the case. Some of appellant's instructions, that were refused, had been given in substance by the court. It is the duty of a court to give the law applicable to a case in plain, not argumentative, instructions, so that the jury will not be confused.

It was not necessary for respondent to work during the whole year to recover. Appellants prevented him from working a portion of the time, but he was ready and willing to perform services under the contract. Before respondent went to New York, W. D. Wann, agent of appellants, told him he would have to go to get a settlement.

Could the expenses referred to in the letter of March 9, 1867, be made a lien on the property of appellants and enforced against it? It cannot be claimed that appellants are not personally liable, unless there was an express contract that respondent's expenses should not be a personal liability. *Tufts* v. *Plymouth M. Co.*, 14 Allen (Mass.), 407.

The issues of the performance of services by respondent, the reasons for his discharge, his competency, his obedience of appellants' instructions, etc., were decided in favor of respondent by the jury, under the instructions of the court below.

Respondent was to receive $4,000 per year. This was payable at the end of each year. The commencement of this suit was a sufficient demand.

The letters of respondent to appellants show that respond-

ent was very particular and thorough in his reports of every thing he did.

There are no specifications of the particular errors on which appellants rely in any part of the transcript. The whole record shows that the law was substantially given to the jury; that no exceptions were taken which would have changed the result; and there may be a conflict of evidence. The judgment should not be disturbed. *Smith* v. *Harper*, 5 Cal. 329; *Dale* v. *Anderson*, 27 id. 250; *Kile* v. *Tubbs*, 32 id. 333.

W. F. SANDERS, for appellants, in reply.

The letter of March 9, 1867, shows that certain expenses were to be borne by the joint property and business, and not by appellants. The letter, like a mortgage, makes a debt a charge on property, but creates no personal liability.

Respondent must show that he made truthful reports to appellants to enable him to recover. It was a part of respondent's contract of service.

The withdrawal of the counter-claim stands on the same footing as the right of a party to dismiss a suit where there is no counter-claim, and this can be done before the court has left the case to the jury.

Respondent must remain at or near the business before he can recover wages on the contract. Respondent cannot claim the discharge was valid, and leave, and then claim that the discharge was a nullity and sue for wages. *Virginia & T. A. Co.* v. *County Commissioners Lyon Co.*, 6 Nev. 72.

The salary was not $4,000 each year, or a year, but at the rate of $4,000 per annum.

The errors relied on were properly saved.

WADE, C. J. This is an appeal from the judgment of the court below, and from the order overruling the motion for a new trial, and whatever appears in the bill of exceptions, taken at the trial and allowed by the court, is properly before us for consideration and decision. The suit is for services alleged to have been performed by plaintiff for

defendants, in pursuance of the terms of a written contract between the parties, and the complaint substantially alleges: That in the months of February and March, 1867, the plaintiff was employed by defendants at their special instance and request, as general manager of the mining business and property of the defendants in Montana Territory, for the period of five years from the 2d day of February, 1867, unless the agreement entered into between the plaintiff and defendants should be sooner dissolved or canceled; that on the 9th day of March, 1867, defendants proposed to pay plaintiff for his services, at the rate of $4,000 per year in Montana currency, allowing greenbacks to be worth 90 cents of the dollar, commencing on the 1st day of April, 1867, which agreement and proposition were made in the city of New York, and accepted and ratified by said plaintiff at the times the same were made; that the plaintiff, being employed as aforesaid, took charge of the mining business and property of said defendants in said Territory, as general manager thereof, in the month of March, 1867, and that he continued to perform the service of such general manager from that date until the 1st of April, 1868, without any fault or omission of duty on his part; that said agreement has never been dissolved or canceled; that the same was in full force and effect from the time the same was made until the 1st day of April, 1868; that the value of said $4,000 in Montana currency was $4,444.44, and that plaintiff was entitled to receive that sum for his services aforesaid, and that no part thereof has been paid, although the same was demanded of defendants in the city of New York, in the month of April, 1868.

The second cause of action charges defendants with the sum of $1,100, for so much money paid, laid out and expended for said defendants by said plaintiff, and to and for the use and benefit of defendants, and at their special instance and request, in defraying the expense of plaintiff and his wife in getting from the city of New York to said Territory.

The third cause of action charges defendants with the sum of $600 for so much money paid, laid out and expended

by said plaintiff for said defendants, at their special instance and request, in defraying the living expenses of the plaintiff in said Territory.

The fourth cause of action charges defendants with the sum of $1,000 for money paid, laid out and expended by plaintiff for said defendants, at their special instance and request, in defraying the expense of plaintiff in going from this Territory to the city of New York, and returning therefrom to said Territory.

The answer of the defendants denies that the plaintiff, in the months of February and March, 1867, or at any other time, was employed by the defendants as general manager of the mining business and property of the defendants, in the Territory of Montana, for the period of five years, or for any other period, than from the 1st day of April, 1867, to the 6th day of January, 1868; and deny that plaintiff continued to perform such services, or any service for defendants, after said 6th day of January, 1868; deny that plaintiff complied in all respects with contract, without any fault or omission of duty on his part; but, on the contrary, allege that plaintiff, when he entered upon their employment as aforesaid, in consideration of the sum agreed to be paid to him for said services, undertook and agreed that he was competent to discharge the duties of general manager and superintendent of the mining business and property of defendants in said Territory; that he would devote his entire time and energies in the discharge of such duties; obey all instructions he should receive from defendants in reference to said business; make full reports from time to time to the defendants of all matters affecting their interests in and about said business; not deceive the defendants with reference to any of said business or property. But alleges that said plaintiff, while so employed as aforesaid, was not competent to discharge the duties of said general manager or superintendent of said mining business and property; did not devote his entire time or energies to the discharge of the duties aforesaid; did not obey the instructions of the defendants with reference to their business; did not make

full, nor truthful, reports of said business to said defendants; deceived defendants with reference to their said business and property; was extravagant in the expenditure of defendants' money; insubordinate to their instructions; made to them false reports in and about their said business; bought other mining property in said Territory with defendants' money without their authority; and would not, and did not, comply with said contract of service. Wherefore, the defendants, on the 6th day of January, 1868, discharged plaintiff from said service and employment; and defendants aver payment of $3,000 to plaintiff on account of his services, between the 1st day of April, 1867, to January 1, 1868.

The answer to the second, third and fourth causes of action is a general denial, and in further answering the defendants set up a counter-claim against the plaintiff, for goods sold and delivered to plaintiff at his special instance and request, and for money had and received of defendants, and for money paid, laid out and expended by defendants for plaintiff at his instance and request, and demanding judgment for amount of counter-claim.

The reply of plaintiff denies that he undertook or agreed with defendants that he was competent to discharge the duties of general manager or superintendent as aforesaid; denies that he agreed to obey all instructions of defendants in reference to said business, and denies that he agreed that he would not deceive defendants about said business and property. Said replication also denies that defendants have paid him $3,000, or any other sum, on account of said service, denies that he was ever discharged from said service, denies counter-claim and all the averments thereof, and alleges faithful performance of his duties under said contract.

The plaintiff, to maintain the issues on his part, introduced and read in evidence the following contract:

"CONTRACT."

"This agreement made this second day of February, in the year one thousand eight hundred and sixty-seven, between

Alexander McAndrew and Samuel Wann, both of the town of Middletown, in the county of Richmond and State of New York, parties of the first part, and Maria Josephine Isaacs, wife of James P. Isaacs, of Montana Territory, party of the second part, and said James P. Isaacs, party of the third part.

"Whereas, the parties hereto of the first and second parts are jointly interested in certain mining property, mill machinery and other property, particularly described in a certain deed thereof bearing date the first day of February, one thousand eight hundred and sixty-seven, made by said parties of the first part to said party of the second part, in the proportion of three-quarters owned by said parties of the first part and one-quarter owned by said party of the second part; and,

"Whereas, the parties of the first part have advanced all the moneys so far expended in purchasing said property, and in the expenses attendant upon and connected therewith, and are to advance such further sums as may be needed in the developing and working of said property: and,

"Whereas, it is desired and intended that said property shall be managed and worked for the joint account as one property, and that the party of the third part shall be employed as general manager and superintendent of the same in Montana Territory:

"Now, therefore, this agreement witnesseth: That the parties hereto, in consideration of the premises and of the mutual covenants and agreements herein contained, have mutually agreed and covenanted, and by these presents do mutually agree and covenant, each with the other, as follows:

"*First.* That the said entire property, mines, mining interests, mill, machinery, and other property of the said parties of the first and second parts, shall be controlled and managed by said parties of the first part, but for their joint account and upon the terms and in the manner hereafter provided for, and to that end the said party of the second part hath made, constituted and appointed, and by these

presents doth make, constitute and appoint the said parties of the first part her true and lawful attorneys, irrevocable during the continuance of this agreement, for her and in her name, place and stead, to take charge of, manage and control her interest in the property aforesaid and for her and in her name, in their discretion to sell such portions of the property as they may deem best, and good and sufficient deeds therefor to execute, acknowledge and deliver.

"*Second.* That said parties of the first part shall make all advances needful and requisite for the further working or developing of the said property, as in their judgment shall be most expedient.

"*Third.* That all the avails, earnings and profits derived from the said property, or any part thereof, shall be received by the said parties of the first part, and shall be by them applied as follows:

> "1. To the re-imbursement of all moneys which may be expended by them the said parties of the first part in or about the care, management, developing or working of said property, or in any expenses connected therewith.
>
> "2. After payment of all expenses as above, one-quarter of all net profits resulting from the working of said property, or sales of any part or parts thereof, shall be credited and paid to said party of the second part, and three-fourths part shall be credited to and retained by the said parties of the first part.

Fourth. That the said party of the third part shall be employed as general manager of the said mining business and property of said parties of the first and second parts, in Montana Territory, during the continuance of this agreement, at a salary to be agreed upon between him and the said parties of the first part, which salary is to be paid as part of the business expenses connected with said joint property and business.

"*Fifth.* That said party of the third part shall and will, during the continuance of this agreement, faithfully devote

his entire time and energies to the management of said joint property and interest, and the conduct of the said business of mining, and to the promotion of, and care for, the joint interest of said parties of the first and second parts.

"*Sixth.* That this agreement is to remain in full force for five years from the date thereof, unless sooner dissolved or canceled by the parties thereto, and that the terms hereof are to bind the legal representatives of said parties of the first and second parts, as well as said parties.

"*Seventh.* That during the continuance of this agreement, the parties of the first and second parts shall not, and will not sell, dispose of, transfer, assign or convey their, or any of their, individual interests in the property aforesaid, or any part thereof, but that all sales, or other dispositions of said property, or any part thereof, shall be for the joint account and benefit of said parties of the first and second parts in the proportion of three-fourths to the former and one-fourth to the latter.

"In witness whereof, the parties of these presents have hereunto unchangeably set their hands and seals the day and year first above written.

"ALEXANDER MCANDEW, [L. S.]
"SAMUEL WANN, [L. S.]
"M. J. ISAACS, [L. S.]
"JAMES P. ISAACS. [L. S.]

"Sealed and delivered in presence of

"CHARLES NETTLETON.
"M. GRAHAM.

[Stamp.]

Which agreement is properly acknowledged before Charles Nettleton, Commissioner for the Territory of Montana in New York.

Also a letter from defendants to plaintiff, fixing the rate of compensation to plaintiff under said contract, of which the following is a copy:

"No. 12 PINE STREET,
"NEW YORK, *March* 9, 1867.

"J. P. ISAACS, Esq., New York:

"DEAR SIR — In accordance with agreement, dated February 2, 1867, executed between you, Mrs. Isaacs, and ourselves, we propose, in behalf of all parties interested in the Montana mining property, that you should, on your arrival out, take charge of the mining business and of said property as general manager, and that your salary for services to be rendered in that capacity shall be at the rate of four thousand dollars ($4,000) a year in Montana currency, allowing greenbacks to be worth 90 cents of the dollar of said currency, such salary to date from the first day of April next.

"The expenses of yourself and wife in getting out there to be charged to, and be borne by, the joint property and business, and your living expenses there to be in like manner a charge on the business.

"Very respectfully,

"MCANDREW & WANN."

This suit was commenced on the 15th day of May, 1869. The contract under which the plaintiff claims pay for one year's service is dated February 2, 1867, the alleged year's service ending April 1, 1868. It will be seen that this contract, by the terms thereof, is to continue in force for five years, unless sooner dissolved or canceled by the parties thereto. This suit was commenced long before the contract had expired, and long before there was, or could have been, a performance thereof by the plaintiff, providing the contract, by its terms, was an entire contract. If the contract is entire in its nature, full performance thereof by the plaintiff is a condition precedent to his right to sue thereon. And if performance by the plaintiff is prevented or made impossible by the action of the defendants, the plaintiff must, at all times during the continuance of the contract, be ready and willing to perform on his part, and he must not place himself in such a situation as to be unable to perform.

If the contract under consideration is an entire contract, that is, if full performance thereof by the plaintiff must be averred and proven before any right of recovery follows, and this contract was, by its terms, to continue for five years, then it could not be contended that this suit, at this time, ought to be maintained.

There are three remedies upon an entire contract, where one of the parties is prevented from performing by the action of the other party.

First. He may keep himself ready, willing and able to perform until the contract, by its terms, expires, and then bring suit on the contract itself.

Second. He may bring suit upon the *quantum meruit* for what his services are actually worth.

Third. He may sue for damages for breach of the contract by the opposite party.

In the present case the plaintiff has chosen to bring his action *upon the contract*, claiming pay for one year's service, and the right to bring this action in this form leads us to a consideration of the contract in question to ascertain whether it is entire or divisible in its character.

The contract provides that the plaintiff *shall* be engaged as general manager of the mining business of defendants *during the continuance of the agreement* (five years), at a salary to be agreed upon between the parties, to be paid as part of the business expenses connected with said property.

The letter above referred to, which forms a part of the agreement and contract, provides that the plaintiff's salary for services to be rendered under said contract shall be at *the rate of four* thousand dollars a year.

The contract does not provide *when* the plaintiff shall receive any pay for his services; and this important proposition, upon which this case hinges, can only be satisfactorily solved and determined by a resort to the authorities.

"If the contract be for a time certain and the servant leave without cause before the time expires, it has been held in many cases in England and in this country, that he has no

claim for services he has rendered." 2 Pars. on Cont. 36; Chit. on Cont. 629–633.

"Nor does it make any difference in this respect whether the wages are estimated at a gross sum, or are to be calculated according to a certain rate per week or month, or are payable at certain stipulated times, provided the servant agree for a definite and whole term; such an arrangement being entirely consistent with the entirety of the contract." *Davis* v. *Maxwell*, 12 Metc. 286; *Winn* v. *Southgate*, 17 Vt. 355.

"In regard to the contract itself which was an agreement to work for the defendant for seven months at $12 per month, we are of opinion it was an entire one, and that the plaintiff having left the defendants' service before the time expired, cannot recover for the partial service performed." 12 Metc. 287; *Hutchinson* v. *Wetmore*, 2 Cal. 310.

"The stipulation of monthly pay does not disjoin the contract, it is adopted only as the means of ascertaining the compensation." *McMillen* v. *Vanderlip*, 12 Johns. 165; *Rice* v. *The Dwight Man. Co.*, 2 Cush. 80.

"Where the plaintiff agreed to work for the defendant for $104, or $13 per month. *Held*, that the contract was entire, and that the work for the whole period was a condition precedent to be performed before the plaintiff could sue for his hire." *Reaf* v. *Moor*, 19 Johns. 337; *Larkin* v. *Burk*, 11 Ohio St. 561; *Lantry* v. *Parks*, 8 Cow. 63.

These cases, and numerous others that might be cited, seem to settle the doctrine, that where the contract is for a time certain at a fixed price per day, per month, or year, and the servant leaves before the stipulated time expires, he has no claim on the contract for the services rendered.

If he is compelled to leave the service by the action of his employer, the rule is not changed. He must then resort to a suit for damages, or to the *quantum meruit* for what his services are actually worth, or he may stand at his post ready to perform until the contract expires, and bring his suit on the contract.

Applying these principles to the case before us, and its

solution is comparatively easy and the right clear. This was a contract for five years' service, and the sum to be paid therefor was fixed at the rate of $4,000 per year, to be paid as part of the business expenses of the enterprise, but the time of payment is not fixed, and in view of the authorities above referred to, we must hold that this is an entire contract, and that work for the whole period was a condition precedent to be performed by the plaintiff before he could sue for his hire.

There is no time fixed for payment in this contract, and the law fixes the time, and that time is the period when the service is performed. It is one agreement, one contract, and performance must be shown before payment can be enforced.

We cannot make contracts for parties, and however convenient pay by the week, month, or year might be, such payments cannot be enforced unless the parties so promise and agree.

Suppose A contracts with B to labor for him for one year at the rate of $1 per day, can it be contended that at the close of each day's service A has the right to bring a suit on such contract to enforce payment for his day's labor? This would not be claimed, and yet the contract under consideration is precisely the same as the one supposed, only on a larger scale.

We do not intend to say that the plaintiff in the present case is without remedy; we only say he has mistaken the form of action he should have brought. If he has been wrongfully prevented from performing his contract by the defendants, he can sue for damages, and, upon the *quantum meruit*, for the value of the labor really performed; and at the end of the five years, if he has not forfeited his right thereto, he may bring his action on the contract for his services for the whole period.

II. The next question arising in the case is as to the sufficiency and competency of the evidence to support the second, third and fourth counts of the complaint. These counts allege that the defendants are indebted to the plaintiff for money paid, laid out and expended for the defend-

ants by the plaintiff, for traveling and living expenses, at their special instance and request. The only evidence to support these averments, as shown by the record, is the last clause of the letter above referred to, which is as follows:

"The expenses of yourself and wife in getting out there to be charged to and borne by the joint property and business, and your living expenses there to be in like manner a charge on the business."

To the introduction of this evidence the defendants objected, upon the ground of irrelevancy and incompetency. The objection was overruled and the defendants excepted.

The language of this letter does not seem capable of a double meaning or of a doubtful construction. The parties were about to embark in a business enterprise, the success of which was uncertain. The pay of the managing agent was secured, and did not depend upon the success of the undertaking. A proposition was made that the traveling expenses of the agent in getting to the territory, and his living expenses while there should be borne by the business. The agent accepts, and thereby undertakes to perform the duties of his employment, and, in so doing, so far as these expenses are concerned, runs the hazard of making the business a success. This offer to pay expenses out of the business was designed to be a further inducement to the agent to achieve success. It was designed to give him an interest in the business to such an extent as that his expenses should depend upon the manner he performed his duties. The traveling and living expenses were to be a charge on the business and the property; that is to say, they were a lien thereon, as between the parties, to be paid from the proceeds thereof. This claim is in the nature of a mortgage. It is against the property and the business, and creates no personal liability.

Can it be successfully claimed that this offer of the defendants, that the traveling and living expenses of the plaintiff might be a charge upon the business and property of the enterprise, creates a personal liability to such an extent that the defendants can be proceeded against in the

first instance, before any attempt is made to exhaust the remedy against the property itself? We think not, and we are therefore of opinion that the demand of the plaintiff against defendants in his second, third and fourth causes of action, for money paid, laid out and expended for traveling and living expenses, is not supported by this evidence, and that the objection to its introduction was improperly overruled.

III. Looking at the verdict of the jury in this case, we ascertain that they find for the plaintiff upon the second and third causes of action in the complaint, and that they compute interest therefrom, from the time the causes of action accrued to the time of trial. It will be remembered that these causes of action are for money paid, laid out and expended by the plaintiff for the defendants, at their special instance and request, and it is contended that the statute does not contemplate the payment of interest upon demands of this nature.

Interest is a creature of the statute, and the rate thereof differs in different States. The statute of Montana (Laws of 1865, p. 535) provides, that creditors shall be allowed to collect and receive interest for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing; on any judgment; also, upon money lent, or money due upon settlement of amounts; upon money received to the use of another and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay. The statute does not seem to contemplate the payment of interest upon money paid, laid out and expended for another, unless it could be claimed on the ground of unreasonable and vexatious delay; and, in such a case, the claim would have to be supported by the necessary averments and proof.

However reasonable the claim for interest may be in the present case, we must administer the law as we find it, and cannot take upon ourselves the duties of the legislature.

IV. A further examination of the verdict of the jury discloses the fact that the jury found that the plaintiff had

performed for the defendants, under said contract, the services claimed in his complaint, that is, one year's service. The evidence shows that the plaintiff commenced work on the first of April, 1867; that, during the summer of that season, he was absent from defendant's business and employment for more than one month, in pursuit of his own business; that, on the 7th of January, 1868, he was discharged from the defendants' employment, and that, on the 17th day of March, 1868, and before his year's service had expired, and of his own motion and without the knowledge of defendants, he left the Territory of Montana and went to the city of New York, and how the jury could find that the plaintiff, from the first day of April, 1867, to the first day of April, 1868, was in this Territory, working for defendants, under this contract, we are unable to see. We would not disturb the verdict of a jury where there is evidence to support it, even though we were satisfied that the verdict was against the weight of evidence, but in this case it seems to be admitted that the plaintiff left the Territory before the year had expired, and for a portion of the time that the jury say he was here at work under the contract, he was in fact in New York city attending to his own affairs.

This finding of the jury is against the evidence.

V. This contract was made in New York, but to be performed in Montana. It is silent as to the place of payment, and as to the rate of interest in case payment is delayed. The question then occurs, where payment should be demanded and the rate of interest that can be claimed if payment is delayed or refused.

This is a naked promise, without any special condition as to the place of payment, and payment must be demanded of the maker where he is or at his domicile. 2 Pars. on Cont. 583.

So that in the case before us, it was necessary to aver a demand of payment, and if the defendants were then residing in New York city, or had their domicile there, it was necessary to prove demand at that place. And it would seem to result from the authorities, that if payment is de-

layed or refused after demand made, the party may collect interest, according to the rate of interest in the county where the contract is performed, if by the nature of the contract interest is recoverable by the laws of that country.

The creditor is supposed to borrow money where he is, and in the country where he is performing the contract, to supply the deficiency occasioned by the failure to pay on the contract, and it would be but justice to allow him to recover on the contract the same rate of interest he is compelled to pay by reason of a breach thereof, and this, upon the ground that where a contract is made in one place to be performed in another, the law of either place may be applied.

VI. James P. Isaacs, the plaintiff in this action, is the husband of Maria Josephine Isaacs, one of the defendants. This is shown by the contract herein set forth. The covenants and undertakings of that contract are between husband and wife, directly without the intervention of a trustee. That is to say, the husband undertakes and promises, for a consideration, to work for his wife and two other persons for the period of five years, the wife and her co-contractors failing to pay, according to the terms of the agreement, as the husband alleges, he brings a suit against his wife and the other contractors, and recovers a judgment against them in the court below, and but for the appeal herein, the husband could have had an execution against his wife's property to satisfy the judgment and costs. Of course such a contract, and such a judgment, as between husband and wife, would be void at common law, but how far the rights of the parties are modified by statute, if at all, and whether the statutes of New York State or of Montana are to control, we are not called upon to decide, as the question is not made in the record before us.

It is proper, however, to observe that, if any statute authorizes such a contract as the one under consideration as between husband and wife, and a suit by the husband against his wife to recover of her the amount due thereon, the strict letter of the statute must be followed in the institution and

progress of such a suit, and it seems impossible that an action of the kind could be commenced and carried forward to judgment and execution without disclosing in the pleadings the true relation of the parties to the suit.

VII. It is assigned for error that the court refused to permit the defendants to withdraw their counter-claim as set up and described in the answer of defendants. The record shows that before the court had finished charging the jury, and after the testimony had closed, the defendants moved the court for leave to withdraw their counter-claim from the consideration of the jury, and as to said counter-claim to dismiss the same, which motion was overruled.

The effect of such a motion is simply an application to amend the pleading, and over such amendments the court should exercise a sound discretion, and it has power to grant or refuse amendments and upon such terms as it thinks just and proper.

We do not think the granting or refusal of amendments can properly be assigned for error except in cases where manifest injustice is done, and this court will not consider an alleged error of this kind unless it is made apparent that the rights of the parties are being infringed.

Judgment reversed and cause remanded.

New trial granted.

GALLAGHER et al., respondents, *v.* BASEY et al., appellants.

EQUITY — *trial of suit — decree — findings of jury.* A suit in equity is properly tried by the court that bases the judgment and decree upon the pleadings, evidence and proceedings in the case in accordance with its convictions, and without any regard to the findings of the jury upon questions that were submitted to aid the conscience of the court, or any other considerations.

EQUITY AND LAW — *power of legislature over proceedings.* The territorial legislature can prescribe the forms of proceedings in cases in equity and ac-

tions at law, but cannot destroy or blend together the separate and distinct jurisdictions of chancery and common law, which have been conferred upon courts by the organic act.

CASES IN EQUITY — *equitable defense — trial by jury — decree.* Cases in equity, in which equitable relief is demanded, and actions at law, in which an equitable defense is made, cannot be tried by a jury as at law, but the decree must be rendered by the judge, sitting as a chancellor in a court of chancery.

STATUTORY CONSTRUCTION — *organic act — "limited by law."* The phrase "limited by law," in the ninth section of the organic act of the Territory, means that the mode and manner of proceedings may be controlled and governed by law.

Appeal from the Third District, Meagher County.

THE decree was rendered by WADE, J. The jury found eighteen special findings.

The facts appear in the opinion.

The parties stipulated that this cause should be "heard and determined on the merits of the decree and special findings and record without brief."

E. W. TOOLE, for appellants.

S. ORR, CHUMASERO & CHADWICK and SHOBER & LOWRY, for respondents.

WADE, C. J. This was an application for an injunction to restrain and perpetually enjoin the defendants from the use of the waters of a certain stream known as Avalanche, situate in the Missouri valley, in Meagher county, Montana.

The complaint is a bill in chancery, and substantially sets forth: That, in the year 1866, the plaintiffs and their predecessors in interest took up certain ranches on the public domain, for the purpose of settlement and cultivation, in the county of Meagher, situate on the Missouri river bottom, a short distance below, a stream known as Avalanche, and that water for irrigating purposes is necessary for the successful cultivation of said ranches. And it is further alleged that, from the year aforesaid to the present time, the plaintiffs and their predecessors in interest and possession have occupied, cultivated, and now occupy and cultivate

said ranches; that at the time of the location of said ranches by the plaintiffs, the water flowing in Avalanche creek was unappropriated by any person, and was subject to appropriation, and that the plaintiffs at that time, by means of a certain ditch constructed by them and their predecessors, appropriated five hundred inches, miner's measure, of the waters of said creek for the purpose of irrigating their said ranches, and that that amount of water is necessary to successfully cultivate the same, and that plaintiffs' ditch taps said creek a short distance above where the same empties into the Missouri river; that continuously since the construction of said ditch, up to the time of the wrongful acts of the defendants herein complained of, the plaintiffs and their predecessors in interest have successfully cultivated their said ranches by means of said ditch and the waters thereby appropriated. The complaint further charges that, long after the appropriation of said waters by the plaintiffs, the defendants, well knowing the rights of the plaintiffs in the premises, and well knowing that said plaintiffs, by virtue of prior appropriation had become entitled to the use of said waters, and in violation of their rights proceeded to erect dams across said creek, above the head of plaintiffs' ditch, and to construct ditches and turn out and divert the waters of said stream, thereby wholly depriving the plaintiffs of the use and enjoyment of the same, to their great and irreparable damage and injury, and thereby rendering the ranches of the plaintiffs worthless for the purposes of cultivation. The prayer of the complaint is for a perpetual injunction to restrain and enjoin the defendants from the use of the waters of said stream to the injury or damage of the plaintiffs.

The answer of the defendants admits that the plaintiffs have ranches on the Missouri river bottom as averred in the complaint, but specifically denies each and every other material allegation of the complaint, and charges that plaintiffs have no rights to the waters of said stream as against the defendants, and that the acts of the defendants have in no manner injured or damaged the plaintiffs or their ranches.

The foregoing statement of the case is sufficient for our present purpose, and it will be seen that the cause is a bill in chancery wherein equitable relief is demanded, and the form of proceedings in chancery practice, as distinguished from actions at law, is properly applicable to the case, and the present inquiry involves the question whether this case was tried as an action at law or as a suit in equity.

By the record it appears that the trial took place at the May term, 1871, of the district court of Meagher county, and that upon the trial certain questions were submitted by the court to a jury to answer, which they did, and the questions and answers were filed with the papers in the case.

Afterward, at the July term, 1871, of the district court of Lewis and Clarke county, the cause came on to be heard upon plaintiff's motion for judgment and decree against the defendants, and in favor of the plaintiffs, the cause having been removed to that court by agreement of the parties for that purpose. This motion having been fully argued by counsel for both plaintiffs and defendants, and the cause finally submitted to the court for judgment and decree, upon the *pleadings*, *evidence* and *proceedings* in the case, the *court find:* That, as against the plaintiffs, the defendant, J. V. Stafford, is entitled to the right to the use and enjoyment of such an amount of the waters of Avalanche creek, mentioned in the plaintiffs' complaint, to be taken from said creek at the head of defendants' ditch, as would amount to thirty-five inches at the head of plaintiffs' ditch, and that such right is clearly established, and that as against the defendants in this action, saving the above amount of the waters of said creek, the plaintiffs in this action are clearly entitled to the full and free use, occupation and enjoyment of two hundred and fifteen inches, miner's measure, of the waters of said creek, to be taken therefrom at the point where their said ditch taps said creek, as described in said complaint, and that said plaintiffs have an indisputable right as against the defendants, to have said amount of the waters of said creek at all times to flow down the same to the head of said ditch.

and that defendants, previous to the commencement of this action, *had diverted* said waters from said plaintiffs' ditch.

It will be observed that the foregoing findings of the court are based upon the *pleadings*, *evidence* and *proceedings* in the case, as fully appears from the decree.

These findings and this decree emanate entirely from the court, and speak the convictions of the court upon the evidence in the case, uncontroverted by any other consideration.

A comparison of the findings of the court as contained in the decree, with the answers to the questions submitted to the jury, will conclusively disclose the fact that the court disregarded certain findings of the jury, and that the court alone is responsible for the decree and the findings thereof.

We are, therefore, of opinion, that the objection of defendants that the case was tried as an action at law, when it should have been tried as a suit in equity is not well taken.

Now for the purpose of settling, so far as is possible, the vexed question as to the right, under our code of civil procedure, of blending in one proceeding actions at law and suits in equity; and, as particularly applicable to the case under consideration, we say: That under and by virtue of the act organizing this territory, the supreme and district courts are clothed with chancery as well as common-law jurisdiction, and in the exercise of the authority thus conferred, the forms of proceedings must conform to the well-known and recognized distinctions pertaining to said jurisdictions, as limited by law, that is to say: causes in equity, wherein equitable relief is demanded, or where an equitable defense is made to a claim at law, must be tried as in a court of chancery, and the decree must proceed from the judge sitting as a chancellor, and it would be error in the class of cases described to try them as at law to a jury: that it is competent to limit and control by statute, the forms of proceedings in actions at law and suits in equity, but that no statute and no law of our legislature can, in any manner, destroy or blend together these separate and distinct jurisdictions; that our organic act recognizes a distinction between suits in equity

and actions at law, and that the substance of this distinction must be preserved, although the forms of proceedings may be prescribed and limited by law, and that the civil code may be followed in equity causes, so far as the same is applicable, but that care must be taken to preserve the distinguishing features of a suit in chancery.

The organic act provides that "the supreme and district courts shall possess chancery as well as common-law jurisdiction." It further provides: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as *limited* by *law*."

The meaning of the phrase "as limited by law," is, that the mode and manner of proceedings may be controlled and governed by law, but this does not at all impair the declaration, that the courts shall possess chancery as well as common-law jurisdiction, and these separate and distinct jurisdictions being thus conferred, they cannot, by any action of the legislature be blended together, but must be kept and preserved inviolate.

The suit under consideration was a bill in chancery, wherein the equitable jurisdiction of the court was properly invoked, and the record herein clearly shows that it was tried to the court sitting as a chancellor, and that the decree emanates from the chancellor, and that the questions submitted to the jury were to aid the conscience of the court, but not to control it, as fully appears from the fact, that while the jury answered that as against the plaintiffs, the defendants had not diverted or appropriated the waters of the stream to the injury or damage of the plaintiffs, the court found precisely to the contrary; that the defendants had diverted and appropriated said waters, to the damage and injury of the plaintiffs, and base a decree for a perpetual injunction upon this fact.

The judgment and decree of the court below is affirmed.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1872, HELD AT VIRGINIA CITY.

Present:

HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. JOHN L. MURPHY, }

DAVIS, appellant, *v.* BLUME et al., respondents.

PRACTICE — *verdict — evidence.* The verdict of a jury will not be disturbed if there is competent evidence to support it.

EVIDENCE — *letter rejected as hearsay — replevin.* In an action to replevy certain cattle from a party who had traded mules for them, the plaintiff cannot introduce as testimony a letter that was written by another party to the sheriff, stating that he had a mortgage upon two of the mules, which were in the custody of the sheriff, under attachment.

SALE OF MORTGAGED PROPERTY. The owner of personal property that has been mortgaged, can sell or exchange the same without affecting the validity of the mortgage.

Appeal from the Third District, Lewis and Clarke County.

THIS cause was tried in February, 1872, by a jury, that returned a verdict for Blume. WADE, J., overruled the motion for a new trial, and Davis appealed. The letter of December 6, 1870, referred to in the opinion, informed Boley, the sheriff, that Davis had advised Watson & Bro. of the levy, by the said Boley, on the mules in controversy, as the property of Sample; that Watson & Bro. were the owners of one span of the mules attached by him; that they had leased the same to Blume for $1 per month, and that Watson & Bro. had a bill of sale of said mules from Blume.

The other facts are stated in the opinion.

CHUMASERO & CHADWICK, for appellant.

The court erred in excluding the letter of Watson & Bro. to Boley. It was material and competent evidence. It showed that respondents had no authority to trade off the mules, and that Watson & Bro. had refused to ratify the trade made by respondents. The letter was properly identified. 1 Phil. on Ev. 184, 185.

The verdict of the jury is clearly against the evidence. The testimony showed that the trade between Sample and respondents was a conditional sale, which appellant and Watson & Bro. had refused to ratify. The jury found that the trade was an unconditional sale.

SHOBER & LOWRY and G. G. SYMES, for respondents.

The trade between Sample and respondents was unconditional. Respondents satisfied the mortgage of Watson & Bro. on one span of the mules. One party cannot rescind a contract, unless both can be restored to the condition in which they were before the contract was made. 2 Pars. on Cont. 679, 680, 780. Appellant could not claim the cattle without returning the mules. *Hunt* v. *Silk*, 5 East. 249.

The letter of Watson & Bro. was hearsay evidence, and inadmissible. 1 Greenl. on Ev., § 99. The letter was not

between the parties to the action, and could have no weight if admitted.

The case was fairly presented by the instructions given at the instance of appellant. The verdict was authorized by the evidence. If there was a conflict of evidence, the verdict will not be disturbed. *Ming* v. *Truett*, Jan. T., 1871; *Kimball* v. *Gearhart*, 12 Cal. 27.

WADE, J. This was an action of replevin, brought by plaintiff, to recover the possession of twelve head of cattle from the defendant.

The testimony shows that the defendant became possessed of the cattle by virtue of having traded for them four mules, with one Sample, an agent of the plaintiff. It seems that Watson & Bro., of Helena, were the owners of a certain mortgage upon two of the mules, and the plaintiff claimed that the sale was not an absolute but a conditional sale, depending for its ratification upon the consent of Watson & Bro., and upon the plaintiff, the trade having been made in his behalf, by his agent, Sample. The trial resulted in a verdict for defendant. Motion for a new trial was made and overruled, and this action of the court is one of the errors complained of.

We have frequently decided that this court cannot disturb the verdict of a jury where there is competent evidence to support such verdict. We have carefully examined the evidence in the case. The leading and conclusive question in the case was whether or not this trade between the parties was a conditional or an unconditional one, and whether or not Sample had authority, as agent, to make the trade. These questions were clearly and fairly presented to the jury, by instructions that neither party have found any fault with, and we are satisfied that the jury found by their verdict according to the weight of evidence. There is not only evidence to support the verdict, but the weight of evidence is in favor of the verdict.

2. The next and only remaining question presented by the

record is, as to the action of the court in excluding a certain letter offered by plaintiff to be read in evidence.

It seems that after the mules were traded for and received by Sample, they were attached at the suit of one Holback for a debt against Sample, and were taken possession of by the sheriff of Jefferson county; and, while the sheriff had possession of the mules, Watson & Bro. wrote a letter to the sheriff informing him of their claim upon the mules. This letter was obtained by the plaintiff and offered in evidence, and excluded by the court.

We are unable to see the materiality of the letter if it had been competent evidence, and it was clearly incompetent, being nothing more or less than hearsay testimony. If Watson & Bro. had had a conversation with the sheriff, and informed him of their claim upon the mules, no one would have supposed that the sheriff could come into court and detail that conversation in evidence; and these claims of Watson & Bro. having been written down in a letter, does not change the character of the evidence.

If the letter had been received in evidence it could have furnished no light upon the question at issue. Suppose Watson & Bro. had a mortgage upon the mules, this would not have changed, or in any manner interfered with, the right of defendant to trade them, subject to the mortgage. A chattel mortgage upon personal property does not prevent an unconditional sale thereof. The mortgage remains good, notwithstanding the sale or exchange of the property, and the object in requiring mortgages of this kind to be filed with the recorder is to give notice to the public, so that where sales and exchanges are made no one will be deceived thereby.

Judgment affirmed.

DAILY, appellant, *v.* REDFERN et al., respondent.

ASSAULT AND BATTERY — *liability of parties.* In an action to recover damages for an assault and battery, the defendants are jointly and severally liable.

PLEADING — *complaint for assault and battery — conspiracy.* In a complaint to recover damages for an assault and battery committed by two persons, it is not necessary to allege that there was any conspiracy or collusion between the defendants.

PLEADING — *complaint for assault and battery — absent party — conspiracy.* In an action to recover damages for an assault and battery committed by a party, at the instance of another, who was absent when the injury was inflicted, the complaint should allege that there was a conspiracy between the parties to make them liable.

CONSPIRACY — *gist of action.* The gist of the action, upon a charge of conspiracy by two persons, is the previous preconcerted agreement or confederation.

Appeal from the First District, Madison County.

JUDGMENT was rendered by MURPHY, J., in November, 1871, and the demurrer of Redfern to the complaint was sustained. Daily appealed. The facts appear in the opinion.

H. N. BLAKE, for appellant.

The only inquiry in this case is, whether facts enough to support the action are stated in any form. *Buzzard* v. *Knapp*, 12 How. Pr. 504; *Graham* v. *Cameron*, 13 id. 362.

Appellant properly sued the respondents jointly. Barb. on Parties, 203, § 2; 2 Hill. on Torts, 292, § 9.

The question of conspiracy is immaterial in this action. The respondents are liable, if they committed the acts set forth in the complaint. In criminal cases of a similar nature, the indictment need not allege collusion or conspiracy. 1 Bishop Cr. Pr., § 566; 2 id., § 68.

The complaint is sufficient. 2 Greenl. on Ev., § 89; *Sampson* v. *Henry*, 11 Pick. 379; 2 Estee's Pl. 1-8.

E. W. TOOLE and R. H. WILLIAMS for respondent.

The complaint does not show that the wrongs averred were done at the same time, but on the same day only. It does

not show any concurrence or concert by defendants. Barb. on Parties, 203; 2 Hill. on Torts, 292, 293.

The complaint is fatally defective in not alleging conspiracy and concurrence between the defendants, and without that the acts of one defendant do not extend to the other. *Brown* v. *Wheeler*, 18 Conn. 199; 1 Greenl. on Ev., § 111; *People* v. *Trim*, 39 Cal. 78.

WADE, C. J. This is an action to recover damages for an assault and battery. There was a demurrer to the complaint; demurrer sustained and judgment for defendants, and from this judgment plaintiff appeals to this court.

The complaint alleges: "The plaintiff in this action complains of John Redfern, Sr., and John Smith, the defendants herein, and for cause of action states, that heretofore, to wit: On November 23, 1869, at and within the county of of Madison, and Territory of Montana, the defendants wrongfully and unlawfully made an assault upon said plaintiff, and then and there struck, kicked, beat, bruised and ill-treated him, and did then and there with a sharp instrument, strike, cut, stab and wound the plaintiff in divers parts of his body in so grievous a manner that his life was by means thereof greatly despaired of, and by reason of such wounding, the plaintiff then and there became sick, lame, etc."

The demurrer of defendant Redfern is based upon the ground that the complaint does not allege any conspiracy or collusion between this defendant and his co-defendant, so as to authorize them to be joined in this action.

Is the demurrer well taken?

A very limited consideration of the nature of an action for an assault and battery will enable us to answer this question. In such an action, the defendants are jointly as well as severally liable, and all who designedly contributed to the injury, may well be joined as defendants, or it would be perfectly competent to sue each one separately, and a judgment against one would be no bar to an action against the others. And this joint liability in no manner depends

upon the collusion, confederation or conspiracy of the parties. It rests simply upon their acts, and there may well be joint action in any given undertaking without any collusion or preconcerted agreement to act. Thus, if two men should commit an assault and battery upon another without any agreement or collusion between them, they would undoubtedly be jointly, as well as severally, liable, for their action is joint, and does not depend upon any previous understanding, whereas, upon a charge of conspiracy by two men, both must be held or both acquitted, and the gist of the action is the previous preconcerted agreement or confederation. An action for an assault and battery does not necessarily have any element of this kind pertaining to it. The action may be brought against twenty men, and sustained as to nineteen and defeated as to one, or it may be defeated as to nineteen and sustained as to one; and whether it was or not would not depend upon any collusion or agreement, but would stand or fall upon the fact whether or not the nineteen or the one contributed to the injury.

The doctrine here enunciated seems to be fully sustained by the authorities.

Mr. Hilliard on Torts, says, p. 312: "Inasmuch as the liability of several persons for the same tort is originally separate as well as joint, it does not lose this character by the mere commencement of a joint action against them, but such action may proceed to different results with regard to the different defendants. Thus, where there is no evidence against one he is entitled to judgment." *Hamilton* v. *McGee*, 19 Md. 43.

So, in an action in tort against six, the plaintiff may recover a verdict against two. *Cooper* v. *South*, 4 Taunt. 802.

This action is trespass, and, in actions of this class, the plaintiff may join as many defendants as he thinks proper, but the question of joint liability is a question for the jury, and if it should appear upon the trial that all the defendants contributed to the injury complained of, all would be liable, even if there was no collusion or concert of action between them. Only those would be liable who contributed

to the injury. Undoubtedly, men may conspire together to, and commit an assault and battery, but the conspiracy or collusion is not a necessary ingredient to create a joint liability.

This doctrine is based upon the proposition, as alleged in the complaint, that both parties were present and committed the injury complained of. If one of the parties was absent, but had procured the other to commit the injury, then, in order to charge the absent party, conspiracy must be alleged and proven.

Judgment reversed and cause remanded.

MOCHON, respondent, *v.* SULLIVAN et al., appellants.

MECHANIC'S LIEN — *common law — possession.* At common law, the lien of a mechanic for labor continued during the time the property remained in his possession, and was lost as soon as he parted with its possession.

MECHANIC'S LIEN — *statutory remedy.* In this Territory, mechanics are entitled to liens for their labor under the statute, which makes them a charge upon the property for a certain period from the commencement of the labor, and the liens are not affected by the possession of the property.

MECHANIC'S LIEN — *proceedings in equity.* The lien of a mechanic is in the nature of an equitable right, and must be enforced according to the rules and principles of a proceeding in chancery.

STATUTORY CONSTRUCTION — *act relating to mechanics' liens — personal judgment.* The part of the act of the legislature "securing liens to mechanics," approved December 30, 1864, which authorizes the rendition of a personal judgment as at law, blends together law and equity in the same proceeding, and is void.

CASES AFFIRMED. The cases of *Gallagher* v. *Basey*, *ante*, 457, and *Woolman* v. *Garringer*, *post*, 535, holding that the blending together of law and equity is in conflict with the organic act, affirmed.

Appeal from the Third District, Lewis and Clarke County.

IN August, 1871, the court, WADE, J., entered a decree in this action. The facts are stated in the opinion.

WARREN & SANDERS, for appellant Sullivan.

No brief on file.

SHOBER & LOWRY and E. W. TOOLE, for respondent.

Mechanics' liens attach from the time of the commencement of the building, and have priority over all incumbrances made thereafter. Acts 1865, 334, § 8; 1 Hill. on Real Prop. 492, § 40; *Mason* v. *Germaine*, *ante*, 263; *Dubois' Administrators* v. *Witson's Trustees*, 21 Mo. 213.

Appellant Sullivan is in default and had no right to appeal. The appeal is taken for delay and vexation, and the judgment should be affirmed with damages. Civ. Prac. Act, § 329; *De Witt* v. *Porter*, 13 Cal. 171; *Nickerson* v. *California Stage Co.*, 10 id. 520.

MURPHY, J. This suit was brought to foreclose a mechanic's lien against certain property described in the complaint of the defendant Sullivan, under an act of the territorial legislature, entitled "An act securing liens to mechanics and others," approved December 30, 1864, and was tried and determined in conformity with the provisions thereof.

John W. Reins, S. M. Hall, A. M. Woolfolk and Geo. W. Fox were also made parties defendant on the ground of interest, against all of whom, as well as defendant Sullivan, default was entered, except Reins, for whom S. H. Bohm interpleaded, alleging a prior lien by virtue of two several mortgages.

The cause was tried by the court, a jury being waived, and upon the pleadings, proofs and findings, a judgment was rendered in favor of the plaintiff against the defendant Sullivan, for $3,410, principal and interest, with interest at ten per cent per annum from date of judgment, and for costs taxed at $45.

There was also a special *fieri facias* ordered to issue to be levied upon the property aforesaid, if not sufficient personal property could first be found to satisfy said judgment and costs, and in that event the property was ordered to be sold and so applied, and the defendants barred and foreclosed from all equity of redemption.

And from the judgment-roll the defendant Sullivan appeals to this court.

The only matters that are necessary for us to consider here, are the character of the action and the nature of the judgment, decree or final order to be entered.

And these questions involve, to some extent, the construction of the statute referred to.

The mechanic's lien is derived from the principle of the lien on personal property at common law, and is based upon statutory enactment in the different States and Territories.

It is remedial in its character, rests upon the broad foundation of natural equity and commercial necessity.

It is not a common-law right, but simply a creature of the statute, and differs in some respects from all other liens known to the law.

Under the common law, a lien only exists while the party continues in possession of the property upon which he has bestowed his labor, for by parting with possession he shows that he thereafter trusts to the personal credit of his debtor.

But to the validity of this lien no possession is necessary, for it is a charge upon the property in the hands of the owner, and when it once attaches, it relates back to and takes effect from the commencement of the labor or appropriation.

It continues, without either form or notice, for a certain period according to the statute, and then is kept alive by the act of the party and judicial process.

It is not a general, but a particular lien, and is in its nature peculiar and of an equitable character.

The doctrine upon which it is founded is upon the consideration of natural justice, that the party who has enhanced the value of property, by incorporating therein his labor or materials, shall have a preferred claim on said property for the value of said labor or materials.

The foundation of the suit to enforce it arises only by virtue of an express or implied contract with the owner, and the proceedings to some extent resemble and are somewhat in the nature of proceedings in rem.

The theory of the lien is, that the party by whom the labor is performed or materials furnished for the erection or repair of buildings, on credit, retains his claim to them after they have entered into the structure and become inseparably connected with it.

The object of the statute is to create and preserve ample security to the laborer or material man, and, therefore, to charge the estate with a lien, or incumbrance, independent of any personal remedy he may have.

The artificer or business man acquires a qualified property in the thing upon which he has bestowed his time and labor, or into which he has incorporated his materials. The very principle upon which his right is grounded comes from the increased value of the property he has brought about, by the accession of his labor or materials, and is purely an equitable one.

And the owner thus benefited holds his property subject to and liable for this equitable claim, which grows out of and depends upon this enhanced value of his interest. We are of opinion that this lien, being an equitable right, or in the nature of an equitable right, must be enforced in conformity to the established rules and principles governing proceedings in chancery. We hold, therefore, that in so far as the mechanics' lien law of this Territory authorizes the rendering of a personal judgment as at law, it blends law and equity together in the same proceeding, is in contravention of the organic act, is in conflict with the doctrine laid down by this court in the case of *Gallagher et al.* v. *Basey et al.*, decided at the last term, and of *Woolman et al.* v. *Garringer et al.*, by which it was re-affirmed at the present term, and is void and of no effect.

The case is remanded, and the judgment is modified in conformity with the order made at the last term.

It is ordered that the decree of the court below in this case be so modified as to make void the personal judgment against defendant Sullivan, and in favor of Mochon, for the amount of mechanic's lien on the premises, and that after sale of the premises judgment be rendered in favor of plain-

tiff and against defendant Sullivan for any deficiency, after such sale, and that the decree provide that the sheriff be appointed special master commissioner to make sale of said premises, and that the decree, when modified as herein specified, be and the same is hereby confirmed.

RIALE et al., respondents, *v.* ROUSH et al., appellants.

G. G. SYMES, for appellants.

CHUMASERO & CHADWICK, for respondent.

THE facts in this case are the same as those in the case of *Mochon* v. *Sullivan*, *ante*, 470, and the same decision was made by the court.

MURPHY, J. This is an action to foreclose a mechanic's lien.

There was a personal judgment in the court below, and execution thereon awarded, and the defendants appealed.

Upon the authority of the decision in the case of *Mochon* v. *Sullivan*, at the present term, we hold that this cannot be done, and the decree or judgment is so modified as to make void the personal judgment, and the cause remanded.

Judgment affirmed in part and reversed in part.

HERBERT, appellant, *v.* KING et al., respondents.

EJECTMENT—*proof—title—possession.* In an action of ejectment, the plaintiff must prove that, at the time the suit was brought, the title or right to the immediate possession of the property was in himself, and that the defendant unlawfully withheld the possession of the same.

PRACTICE—*nonsuit—review of evidence.* In reviewing the ruling of the court below in granting a nonsuit, this court will consider every fact as proven which the evidence tended to prove.

PRINCIPAL AND AGENT—*fraud of agent.* The principal is liable for the fraud that has been perpetrated by his agent, who was acting within the scope of his authority.

PRINCIPAL AND AGENT—*authority of superintendent of a flume.* Courts will not enlarge the authority of an agent, and the acts of a superintendent of a flume in constructing, repairing or superintending the same, are binding upon the principal; but his acts and declarations upon matters that are foreign to the flume cannot affect his principal.

PRACTICE—*grounds for nonsuit.* A nonsuit should be granted if there is no proof to support a material averment of the complaint.

Appeal from the First District, Jefferson County.

IN October, 1871, the court, MURPHY, J., sustained the motion of King *et al.* for a nonsuit.

SHOBER & LOWRY and G. G. SYMES, for appellant.

Granting a nonsuit on the facts is a question of law, and may be reviewed on appeal from the judgment roll, and statement of the evidence on appeal. 3 Estee's Pl. 496; *Cravens* v. *Dewey*, 13 Cal. 42; *Darst* v. *Rush*, 14 id. 82; *Pratt* v. *Hull*, 13 Johns. 335.

A nonsuit cannot be granted when there is any evidence tending to prove plaintiff's case. *McKee* v. *Green*, 31 Cal. 418; *Kelley* v. *Kelley*, 43 Barb. 419; *Cravens* v. *Dewey*, 13 Cal. 42.

In considering the ruling on the nonsuit, this court will consider as proven every fact which the evidence tended to prove. *Dow* v. *Gould & C. M. Co.*, 31 Cal. 650; *Dero* v *Cordes*, 4 id. 117; *Labar* v. *Koplin*, 4 N. Y. 547.

The answer admits that appellant was the legal owner of the mining claims in controversy. Appellant testified di-

rectly that respondents had possession of the claims at the time of the commencement of the suit and afterward. It was error for the court to grant the nonsuit, because we cannot go into the question of the contradiction of this testimony. If contradicted, the province of the court ends and that of the jury begins.

The declarations of O'Brien were made when he was the agent of respondents and acting within the scope of his authority. They should have been admitted. 1 Greenl., § 113; Story on Agency, §§ 134–137; 1 Phil. on Ev. 381; *Thalhimer* v. *Brinkerhoff*, 4 Wend. 394.

If an agent, when acting within the scope of his authority, perpetrates a fraud or wrong on another, or occasions a consequential injury, the principal is liable. Story on Agency, §§ 452, 453, 308; 2 Greenl. on Ev., § 68; *Foster* v. *Essex Bank*, 17 Mass. 479; *Williams* v. *Mitchell*, id. 98; 1 Pars. on Cont. 73, 74; *Jeffrey* v. *Bigelow*, 13 Wend. 518; *Schieffelin* v. *Harvey*, 6 Johns. 170.

The credibility of witnesses is with the jury. The court cannot grant a nonsuit because it thinks, from other circumstances in the case, that the witness did not tell the truth. *Merritt* v. *Lyon*, 3 Barb. 110. A conflict of evidence between the plaintiff's witnesses prevents a nonsuit.

CHUMASERO & CHADWICK and E. W. TOOLE, for respondents.

Appellant cannot recover in this action unless he proves two facts. 1. Title in himself or the right to the immediate possession at the time of the institution of the suit. 2. That possession was unlawfully withheld by respondents at that time. The appellant failed to establish either proposition and the nonsuit was properly granted.

Appellant failed to show that respondents had given O'Brien authority to act for them in the matters sought to be proved. The agency must be fully established before the principal is liable for the declarations of the agent. The extent of an agent's power is a question of law for the court to determine. The declarations of O'Brien were pro-

erly excluded. Counsel cited the following cases in addition to those of appellant: *Garfield* v. *Knights F. W. Co.*, 14 Cal. 37; *Gerke* v. *California N. Co.*, 9 id. 258.

A nonsuit should be granted if the court could not sustain a verdict on the testimony. *Stuart* v. *Simpson*, 1 Wend. 376; *Pratt* v. *Hull*, 13 Johns. 334; *Ringgold* v. *Haven*, 1 Cal. 115; *Ensminger* v. *McIntire*, 23 id. 593.

WADE, C. J. This is an appeal from a judgment of nonsuit in the court below, and the question herein presented is whether or not the nonsuit was properly entered.

The action is a suit in ejectment to recover possession of certain mining claims in Baker district, Confederate gulch, in the county of Meagher, embracing three hundred and ninety linear feet of said gulch.

The complaint sets up title in the plaintiff, the right to immediate possession, and the possession of the defendants at the commencement of the suit. The answer denies the title of the plaintiff, denies his possession and the right thereof, and denies possession of defendants, and disclaims all right, title and possession by defendants to the grounds in dispute.

The case was argued upon the hypothesis that the pleadings admitted the ownership of the plaintiff, but such is not the case. The amended answer denies that plaintiff is entitled to the possession, and avers that whatever right the plaintiff had in the ground had been abandoned and forfeited by him, and lost under and by virtue of the usages and customs of the district where the ground was situated, so that no presumption can arise upon the supposed fact that plaintiff was and is the owner of the ground. By the pleadings, title is one of the questions in issue by virtue of the averment of forfeiture.

In order to maintain the action of ejectment, the plaintiff must prove, first, title in himself, or the right to the immediate possession at the time of instituting the suit. This right must exist at the time the suit is brought. A right prior or subsequent to that time will not avail, and second,

he must prove that possession was unlawfully withheld by defendant at the time. A failure to prove either of these essential elements will defeat the action of ejectment, and if there is no proof to support a necessary and vital averment of the complaint, a nonsuit would be properly granted.

It seems by the pleadings and proofs in this case, that on the 9th day of March, 1868, the plaintiff was the owner of and in the possession of the mining ground in dispute, and on that day the plaintiff, and defendants King and Gillette, entered into a contract in writing concerning said ground, whereby said plaintiff agreed to deliver possession of the ground to said defendants for the purpose of having the same drained and the gold extracted therefrom, the plaintiff to receive one-half the gold so extracted. King and Gillette were at that time constructing a flume for mining purposes, and the agreement so made between the parties was to be null and void providing said flume did not strike bed-rock at the lower end of said ground, and it was further agreed that King and Gillette should represent the ground until the fulfillment of the contract.

In pursuance of this agreement, King and Gillette entered into possession of said ground and continued to construct their flume until sometime in the summer of 1868, they had reached the lower end of said ground with the flume, and it is admitted that it did not strike bed-rock at that point.

Immediately after it was found that the flume failed to strike bed-rock the plaintiff was notified of the fact, for we find that in September, 1868, he made arrangements with one Leonard to represent the ground, the contract of King and Gillette to represent it having expired upon the failure to reach bed-rock, and they having ceased to represent the ground at that time. It further appears from the testimony that for a month or two after King and Gillette ceased to represent the ground by reason of having failed to strike bed-rock with their flume, the ground was unrepresented, and thereby became subject to relocation by any party who desired to take it up and occupy it. This failure to represent the ground, the testimony shows, forfeited the plain-

tiff's right to it, and it became subject to relocation like any other parcel of the public domain. If this alleged forfeiture was caused by any wrongful act of King and Gillette, undoubtedly they would be liable in damages therefor, but we have nothing to determine now as to that question.

It further appears by the proof, that this ground being vacant and subject to relocation and entry, was taken up and located by Harwood, Simms and Clarke on the 16th of November, 1868, and was subsequently mined and worked out by them.

The ground could not be worked except through the flume of defendants, and the parties who relocated the ground purchased the right to work two hundred and twenty feet thereof through this flume by selling to King and Gillette, through their agent O'Brien, one hundred and seventy feet of said ground. At the time the ground was relocated by Harwood, Simms and Clarke, the defendants King, Gillette and O'Brien had no interest therein, but subsequently acquired title to one hundred and seventy feet from the relocators. It is further shown that the plaintiff was on the ground and worked there to a certain extent in November, 1868.

Thus far the proof produced by plaintiff tends directly to defeat his case, and to show that he had neither the title or the right to the possession of the ground in controversy, but plaintiff testifies in his own behalf and says that defendants, King and Gillette, and others, had possession of the ground at the time the suit was commenced, and for some time afterward, and upon this testimony the plaintiff rests his claim that the judgment of nonsuit should be reversed.

In the light of this testimony did the court err in giving judgment of nonsuit?

It is undoubtedly true that, in considering the correctness of the ruling of the court below in granting a nonsuit, this court will consider as proven every fact which the evidence tended to prove. *Cravens* v. *Dewey*, 13 Cal. 42; *Pratt* v. *Hall*, 13 Johns. 335; *Dorst* v. *Bush*, 14 Cal. 82; *McKee* v.

Green, 31 id. 418; *Kelley* v. *Kelley*, 3 Barb. 419; *Dow* v. *Gould, etc., Mi. Co.*, 31 Cal. 650; *Dero* v. *Cordez*, 4 id. 117, *Laboc* v. *Karplin*, 4 N. Y. 547.

Looking at the whole evidence produced by plaintiff, which is all the evidence in the case, what does it tend to prove? The weight of it overwhelmingly preponderates against the plaintiff. It tends directly to show that the right of the plaintiff to the ground in question had been forfeited; that third parties had acquired the title thereto, and by virtue of the title so acquired had mined and worked out the ground. It is true that the plaintiff testifies that the defendants had possession of the ground at the time of the commencement of this action; but having, by his own testimony, shown that the ground had been forfeited, and that title thereto had been acquired by third persons long before the suit was commenced, and that the ground had been fully worked out, such testimony is like swearing against a deed or a record. It does not even raise a presumption; and if a verdict had been rendered for the plaintiff upon the testimony produced in this case, the court, undoubtedly, would have been compelled to set it aside upon the ground that there was no substantial evidence to support it. But it is not necessary to determine the case upon the testimony produced, as to defendants being in possession. It will be remembered that the plaintiff must show affirmatively that he is entitled to the possession. There is no affirmative proof of the kind, but, on the contrary, the proof all tends to show that third parties had acquired the title and the right to the possession, and that the plaintiff had entirely lost his right to the possession. Instead of showing title and the right of possession in the plaintiff, the proof tends directly to show that right in Harwood, Simms and Clark.

There is much doubt as to the competency of the proof by which this alleged forfeiture was proven. The local laws of the district, if there are any, upon the subject of mining, were not produced and proven in evidence, neither were the customs, usages and rules of the district shown,

but the plaintiff produces testimony tending to show that the mining ground in question was unrepresented for five or six weeks, and that it thereby became subject to relocation; that this failure to represent the ground forfeited the right of plaintiff therein, as well as that of the defendants, if they had any right thereto; and that the ground, being subject to relocation, was taken up by Harwood, Simms and Clarke. This proof was produced by plaintiff. The men who relocated the ground worked it out after selling one hundred and seventy feet to King and Gillette, and the plaintiff made no objection thereto. If he had not forfeited the ground he could have enjoined their working it; but this proof, such as it is, being called out by the plaintiff, and being against his interest, we are inclined to take it as true, and to say therefrom that the ground became forfeited and subject to relocation in November, 1868. It is certain by the proof that the ground was relocated, and was worked out by the relocators unmolested, and with the knowledge of the plaintiff, and that he never asserted any title thereto; and these facts alone raise a strong presumption that they had a right, by the laws of the district, to relocate and work it, and we believe we are justified by the proof in saying that the ground was abandoned by plaintiff after King and Gillette ceased to represent it.

There is no proof whatever that the plaintiff was entitled to the possession of the ground at the commencement of the suit. The only proof on the subject is the bare presumption that, because the plaintiff was owner in 1868, therefore he was entitled to the possession in 1870, when the suit was commenced. This, indeed, is a violent presumption, when taken in connection with plaintiff's acts, in permitting the ground to be relocated and worked by third persons, with his knowledge and consent, before the action was brought.

2. Did the court err in striking out the declarations of O'Brien? O'Brien was agent for King and Gillette in superintending their flume, and any declarations made by him, within the scope of his authority, would bind his principals.

The extent of the power of an agent to bind his principal is a question of law for the court.

If an agent, when acting *within the scope of his authority*, perpetrates a fraud or wrong on another, or occasions a consequential injury, the principal is liable. Sto. on Agency, §§ 452, 453, 308; 2 Greenl., § 68; *Foster* v. *Essex*, 17 Mass. 479–507; *Williams* v. *Mitchell*, id. 98; *Schieffelin* v. *Harvey*, 6 Johns. 170; 1 Pars. on Cont. 73, 74.

But, where the principal is thus held liable, the agent must have acted strictly within the scope of his authority, so as to make the agent's acts the acts of the principal, and courts will not tolerate any enlargement of this liability, but it must be confined to acts strictly within the scope of the authority conferred.

O'Brien's authority was the authority of a flume superintendent, and any of his acts necessary to the construction, repairing or superintending the flume, would bind his principal, but the acts and declarations sought to be introduced had no possible connection with the flume. They were entirely foreign to his authority as agent, and could in no manner bind his principal, and were properly excluded.

Judgment affirmed.

MURPHY, J., concurred.

KNOWLES, J., dissenting. I agree to that part of the decision striking out declarations of O'Brien, but think there was evidence enough to have warranted the jury in finding that King and Gillette were in possession of the upper one hundred and seventy feet of the ground in dispute, and that the jury might have found against them for that ground, without damages, although I am far from holding that I would have found thus, had I been the jury.

SIMONTON, respondent, *v.* KELLY et al., appellants.

MECHANICS' LIEN—*trial*—*case affirmed.* The case of *Mochon* v. *Sullivan*, *ante*, p. 470, deciding that a suit to foreclose a mechanics' lien is an equitable action and must be tried by the judge, sitting as a chancellor, affirmed.

Appeal from the Third District, Lewis and Clarke County.

THIS case was before the court in August, 1871, and is reported *ante*, p. 363. WADE, J., rendered a decree in favor of Simonton, in June, 1872, and Kelly appealed.

The cause came on regularly for trial on June 14, 1872, and the court, WADE, J., ordered that the same "be tried in accordance with the rules and practices established in equity cases, and that the same be regarded as an equity cause, and, as such, tried by the court." To all of which Kelly excepted. The other facts appear in the opinion and the first report of the case, *ante*, p. 363. The decree of the court finds the facts relating to the contract between the parties for the construction of a certain building; that Simonton performed the same; that there was due to him from Kelly a certain sum, and that Simonton had acquired a lien on the building for the payment of said sum, under the statute securing liens to mechanics. The court then ordered, adjudged and decreed, "that the claim so due and owing to said plaintiff, to wit, the sum of $1,211.25, be and the same is hereby declared and decreed to be a lien upon the said premises above, herein and in said complaint described. And it is further ordered, adjudged and decreed, that all and singular the said premises mentioned and described herein, and in said complaint, or so much thereof as may be sufficient to raise the amount due the plaintiff for the principal, interest and costs in the suit and expenses of sale, be sold at public auction by or under the direction of Rufus E. Arick, Esq., one of the masters in chancery of this court; that said sale be made in the town of Helena, in said county; that said master gave public notice of the time and place of such sale, according to the course and practice

of the court, and the law relative to sales of real estate under execution, and that the plaintiff or any of the parties to this suit may become the purchaser thereof at such sale, and that the said master, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of said premises; that said master, out of the proceeds of such sale, retain his fees, disbursements and commissions on said sale, and pay to the plaintiff, or his attorneys, out of said proceeds, the costs in this suit, taxed at $, and the sum of $1,211.25, being the amount due him as aforesaid, with interest thereon from this date, at the rate of ten per cent per annum, or so much thereof as said proceeds will pay of the same." The decree further ordered, that the master should make a report of the sale to the court; that certain parties having an interest in the premises be barred and foreclosed of all equity of redemption therein; that the purchaser be let into the possession of the premises on the production of the master's deed, and that "if the moneys arising from the sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with the interest and costs and expenses of sale as aforesaid, the master in chancery shall specify the amount of such deficiency and balance due to the plaintiff, in his return of said sale; and that, on the coming in of said return, a judgment of the court shall be docketed for such balance against the defendants, Henrietta Kelly and John Kelly, who are personally liable to the said plaintiff for the amount of such deficiency, and judgment, with interest thereon, at the rate of ten per cent per annum, from the date of last-mentioned return and judgment, and that the plaintiff have execution therefor."

E. W. TOOLE, J. J. WILLIAMS and SHOBER & LOWRY, for appellant.

The court erred in refusing appellants a jury trial. Acts 1865, 335, § 12.

The court erred in ordering a sale of the property first, and a judgment for any deficiency to be entered, if the prop-

erty failed to bring the amount found due. Acts 1865, 336, §§ 18, 19. A special *fieri facias* must issue before the property is sold. If no other property can be found, then the property against which the lien is established is to be sold.

The mechanics' lien law is strictly a statutory proceeding, and is unknown to the common law or chancery. The proceedings should comply with the statute. Houck on Liens, §§ 17, 47, 58, 67, 69, 70, 71, 75.

CHUMASERO & CHADWICK, for respondent.

No brief on file.

WADE, C. J. This was an action to foreclose a mechanics' lien, tried at the June term of the district court of Lewis and Clarke county.

The defendant made a motion asking that the cause be tried to a jury. This motion was overruled, and the cause ordered to be and was tried before the court sitting as a chancellor. This action of the court is assigned as error.

This being a suit to foreclose a mechanics' lien, is an equitable action, and was properly tried to the judge sitting as a chancellor, and without the intervention of a jury. A jury in such a case is only proper when asked for by the court, in aid of its conscience upon any particular question or issue in the case.

This case involving the same questions as those decided at this term in the case of *Mochon* v. *Sullivan*, reference is here made to that decision.

Judgment affirmed.

McMULLEN, respondent, *v.* ARMSTRONG, appellant.

PRACTICE — *dismissal of appeal — motion to perfect appeal.* A motion to perfect an appeal from the probate to the district court, which was not supported by affidavits, and was submitted after the appeal had been dismissed and a final disposition of the case had been made, was properly overruled by the court.

PRACTICE — *reasons of court.* A correct decision will not be reversed, although the court erred in its reasons for making the same.

PRACTICE — *presumption in favor of ruling of court below.* If the record does not contain the facts, this court will presume that a motion to dismiss an appeal was properly granted by the court below.

Appeal from the Third District, Lewis and Clarke County.

McMULLEN recovered judgment in the probate court of Choteau county against Armstrong, in May, 1871. Armstrong appealed to the district court of Lewis and Clarke county, to which Choteau county is attached for judicial purposes. The court, WADE, J., dismissed the appeal in November, 1871, and refused to allow Armstrong to perfect his appeal on the following ground: "That the appeal could not be perfected because the record showed that the probate court did not send the papers in the case, and a transcript of the docket to the district court, within ten days after the notice of appeal and undertaking on appeal was filed in the said court of probate; and that the probate court failing in this duty, the right of appeal was lost." The other facts are stated in the opinion.

G. G. SYMES, for appellant.

The court below dismissed the appeal because the probate judge of Choteau county did not comply with the statute, and send the papers and a transcript of the docket to the clerk of the district court. Acts 1869, 69, § 7.

Appellant did all that the law required of him in the premises. He cannot be made to suffer because the probate judge did not perform his duty. *Little* v. *Smith*, 4 Scam. 400; *Ewing* v. *Bailey*, id. 420; *Sherman* v. *Rolberg*, 9 Cal. 17.

The appeal was perfected within thirty days as required by law. Appellant would have been entitled to a writ of mandate to compel the probate judge to send up the record, if he had not already so done. *People* v. *Harris*, 9 Cal. 571; *Sherman* v. *Rolberg*, id. 17.

The cross-motion in this case amounts to a confession that the record was incomplete in certain respects. But the court held that the failure of the probate judge to forward the papers on appeal was a defect that could not be remedied.

SHOBER & LOWRY, for respondents.

To constitute an appeal, three things are necessary: 1. Filing notice. 2. Service of notice. 3. Filing the undertaking. If these steps are not taken within the time limited by statute, the appeal is not perfected, and the court appealed to has no jurisdiction. *Franklin* v. *Reiner*, 8 Cal. 340; *Whipley* v. *Mills*, 9 id. 641; *Hastings* v. *Halleck*, 10 id. 31; Voorhies' Code, 567 *d*, 571 *a*.

The notice is to the respondent or his agent. The law requires a copy of notice to be served upon the adverse party or his attorney. Acts 1869, 68, § 3. The undertaking must be accompanied by the affidavits of the sureties that they are residents of the county, householders, etc. Acts 1869, 69, § 6.

The transcript of the probate court is not here. Respondent rests his case on the grounds set forth in the motion to dismiss the appeal. The cross-motion of appellant was unauthorized. Appellant should have made a showing by affidavit if he wished to perfect the record. The cross-motion was filed after the appeal had been dismissed.

MURPHY, J. This case was brought to the district court of the third judicial district on appeal from Choteau county, and was there heard upon the motion of the plaintiff to dismiss the appeal.

The motion was sustained in the court below, and the appeal dismissed. And from the order of dismissal and judgment the defendant appealed to this court.

From the bill of exceptions it appears that, on the hearing of the plaintiff's motion to dismiss, the defendant suggested to the court that he could perfect the appeal as to the defects set forth and pointed out in said motion; and, after the decision upon the same had been made, on the following morning, did move the court for leave to do so, founding his motion upon affidavits to be thereafter filed.

But the record nowhere shows that any such affidavits were ever filed, or that any showing whatever was made to sustain said motion, and the court, in the lawful exercise of its acknowledged discretion in the premises, refused and disallowed the same, as it had the undoubted right to do under the circumstances of the case.

Upon the hypothesis that it was within the power of the court, it was, at most, entirely discretionary with it, whether or not it would entertain the motion at all, or even permit it to be placed on file, after a hearing and determination of the matter in issue.

The appeal had been dismissed, a judgment for costs entered, the parties sent out of court, and a final disposition made, not only of the matter to which the motion related, but, in fact, of the whole case.

The motion thus coming too late, and utterly unsupported at that, it was not only within the province of the court, but its unquestionable duty to disregard it.

And assuming or admitting that the reasons assigned for, and by which the court was governed in making its ruling, are erroneous, yet it makes no difference if the ruling itself is proper and correct.

It matters not by what process or method of reasoning, or by what form of argument or manner of deduction, whether true or fallacious, a conclusion is arrived at, provided the conclusion itself is right.

And the mere fact of a just and correct decision being based or founded upon an incorrect or false theory, will be of no avail to impair or vitiate the validity of the decision itself.

As the record does not bring up the transcript from the probate court, upon the incompleteness and insufficiency of which the motion to dismiss was predicated, we have no means of examining the grounds of said motion, and are, in the absence of such, bound to presume the action of the court in sustaining it, to be correct.

Therefore, the order and judgment below are affirmed.

Judgment affirmed.

UNITED STATES, respondent, *v.* 196 BUFFALO ROBES, ETC., appellants.

INDIANS—*license to trade with—approval.* A party cannot trade with Indians in the Indian country under a license which has not been approved by the commissioner of Indian affairs.

INDIANS—*license to trade with, not transferable.* A license to trade with Indians in the Indian country is a personal privilege to the person therein named, and cannot be transferred to other parties.

INDIAN COUNTRY—*settlements of white men.* Evidence that there are settlements of white men in a certain section of Montana, is not admissible to prove that it is not a part of the Indian country.

MONTANA IS INDIAN COUNTRY. All the country within the limits of Montana Territory is regarded as Indian country, under the laws of the United States regulating trade and intercourse with Indian tribes.

STATUTORY CONSTRUCTION—*repeals by implication.* A statute, passed subsequently to another act which is incompatible with its provisions, repeals by implication the parts of the first act that are inconsistent with it.

STATUTORY CONSTRUCTION—*organic act—Indian intercourse act—rights of settlers.* The organic act creating the Territory of Montana gave permission to people to come to the Territory and bring the necessaries and comforts of life, and thereby repealed that part of the law of the United States which gives agents of the Indian department the power to expel persons from the Indian country, and prevent citizens from bringing within the Territory the necessaries of life.

STATUTORY CONSTRUCTION—*organic act—Indian license.* The organic act does not repeal the law of the United States which requires persons to obtain a license to trade with Indians in the Indian country.

STATUTORY CONSTRUCTION—*treaty with Blackfoot tribe—Indian country.* The fourth article of the treaty made in 1855 between the United States and the Blackfoot tribe of Indians (11 U. S. Stat. 657), makes that portion of Montana in which Camp Cook is situated, the home of the Blackfoot nation, and it is Indian country in the fullest acceptation of the term.

STATUTORY CONSTRUCTION — *organic act — rights of Indians.* The first section of the organic act, relating to the rights of Indians in this Territory, protects the rights of person and property, which Indian tribes have acquired under treaties with the United States.

STATUTORY CONSTRUCTION — *treaty with Blackfoot tribe — jurisdiction of Territory.* White persons living in the Indian country within the limits of Montana are subject to the laws of this Territory. The clause in the treaty of 1855, which gives the Indians of the Blackfoot nation the exclusive control over a certain region, was adopted to prevent the United States from interfering with the customs and tribal relations of that nation.

STATUTORY CONSTRUCTION — *organic act — Indian regulations.* In the proviso of the first section of the organic act, the United States has expressly reserved the right to make regulations respecting the Indians within this Territory.

FORFEITURE OF GOODS IN INDIAN COUNTRY — *license.* Goods were legally seized and forfeited under the laws of the United States, which were traded for in the Indian country in Choteau county, Montana, by persons without any license therefor from the United States.

Appeal from the Third District, Lewis and Clarke County.

IN January, 1871, Langler and Carson, the claimants in this action, demurred to the libel of information, and assigned three causes therefor, to wit: That the goods were not seized in an Indian country; that the goods were purchased and procured in a regularly organized county, subject to settlement and occupation by citizens of the United States; and that the libel did not state facts sufficient to constitute a case of forfeiture. This demurrer was overruled by the court, WARREN, J., and claimants excepted.

The cause was tried in March, 1871, by a jury that returned a verdict for the United States. After the evidence for the respondent had been introduced, the claimants filed their motion for a nonsuit, on grounds similar to those assigned in the demurrer. The court, WARREN, J., overruled the same, and claimants excepted.

During the trial the claimants excepted to the rulings of the court in refusing to allow them to prove the contents of a certain license and receipt; and also that the country where the goods were traded for had been settled for several years by the whites; that it was in Choteau county, Montana; that the government was surveying the same into

townships and sections; and that the land office in Helena was receiving filings upon the same from settlers in Choteau county.

Claimants filed their motion for a new trial, which was overruled, in December, 1871, by the court, WADE, J., and claimants appealed. The attorneys stipulated that the case should be tried on its merits as disclosed by the transcript, and waived the notice of appeal and undertaking. The other facts appear in the opinion.

SHOBER & LOWRY, and E. W. TOOLE and W. F. SANDERS, for appellants.

The court erred in overruling the demurrer. Courts take judicial notice of towns, counties, etc. 1 Greenl. on Ev., § 6; Organic Act, § 1. The organic act opened all of Montana Territory to settlement by citizens, with all the rights incident thereto. Organic Act, § 6, relating to legislative power; Acts 1865, 531, § 8, organizing Choteau county.

The information shows that Choteau county is not Indian country. If Choteau county is Indian country, then Helena is, and the property of its citizens is liable to confiscation. Such a doctrine is repugnant to justice and law.

The claimants had procured a license to trade, and the Indian agent, Reed, permitted them to trade under it. 1 Brightly's Dig. 427, §§ 52-54. Claimants acted in good faith under the permit of the superintendent of Indians. Forfeitures are odious in law. Persons acting in good faith, like claimants, should not suffer because officials authorized them to do what they did.

The evidence as to the surveys and settlement of the country, in which the goods were traded for, was competent. Would land be Indian country after a person had entered a quarter section in Choteau county and procured the government title thereto? The law on which respondent relies is not applicable to this case. It relates to an Indian reservation, or a country that is strictly Indian, in which settlements by whites are prohibited by law. 3 Kent's Com., Lecture 51.

If Choteau county is Indian country, within the meaning of the act regulating intercourse between the Indians and whites, courts, merchants and citizens are all trespassers. Spirituous liquors cannot be introduced into the Indian country except through the military department.

C. HEDGES, United States Attorney, for respondent.

The information alleges that the acts complained of were committed in the Indian country in Choteau county. The name of the county was added for local description. County lines were established by the legislature. The organic act expressly reserves the rights of Indians. Organic Act, § 1. It is conceded that this place, where the goods were traded for, is under the control of the Blackfoot nation. The treaty with that tribe has never been extinguished. The legislature of Montana cannot act in the premises. See Treaty, 11 U. S. Stats. 657. Indian country is defined in 1 Brightly's Dig. 427, § 51.

The court properly refused to allow claimants to prove the contents of a license. The license relied on was not valid. It had never been approved by the commissioner of Indian affairs. Regulations War Department, Nov. 9, 1847, § 7. The proof of its contents was immaterial.

The evidence relating to United States surveys and pre-emptions in Choteau county was properly excluded. It could only go to the extent of showing that the government had acted inconsistently with treaty stipulations. The force of such evidence cannot be extended beyond the point of immediate inconsistency. Such evidence, to have any value, must show that the locality, where trading was proved to have been done, had been surveyed and thrown open to pre-emption.

The claimants should have proved that they had a valid license to trade with Indians. In this they failed.

KNOWLES, J. The facts appearing in the record are that the claimants, Carson and Langler, traded for one hundred and ninety-six buffalo robes, one elk robe, two beaver skins,

one kit beaver, four wolf skins, and one buffalo cow skin, dressed for lodge, at or near a place known as Camp Cook, within the bounds of Choteau county, Montana Territory. That T. C. Powers made application for a license to trade with the Crow Indians, near Camp Cook, of Gen. Sully, the Indian superintendent for the Territory, for himself and McKnight. The license was made out by Sully, but it does not appear that it was ever approved by the Indian commissioner at Washington. It was sent to Parker, who then occupied that position, and by him returned to Viall, the present superintendent of Indian affairs, and by him lost. In this application Langler was named as a trader at Camp Cook. It also appears that McKnight had a license to trade with the Crow Indians at or near Camp Cook, but it does not appear that in this transaction Carson or Langler were acting for him or had any connection with his license. Powers testified as follows: "They (Carson and Langler) procured the goods from me that they traded for the goods described in the information. They were general Indian goods; no whisky. They were to pay me in furs for the goods they purchased of me, and were bringing them to me at the time they were seized."

The attempt to prove the contents of a license to Powers and McKnight was properly refused. First. For the reason that a license is of no validity to trade with Indians without the approval of the Indian commissioner. See 4 Stats. at Large, 735, § 2, and Regulations of War Department, Nov. 9, 1847.

Second. Because a license to Powers and McKnight, although Langler may have been named therein as a trader, would not have been a sufficient warrant for Carson and Langler to trade with Indians in their own right, as it clearly appears from the evidence of Powers they did. Powers and McKnight could not give them authority to trade under their license. A license gives a personal privilege to those named therein to trade, and the privilege cannot be transferred to others. It does not appear, however, that there was any attempt to do any thing of this kind.

For the same reason as the last named, the court properly excluded the license to McKnight. It was not pretended that Carson and Langler traded under it for McKnight, but for themselves, and they could have received no authority to trade under it for themselves. Neither does it appear that Carson or Langler were named in it as traders. The court properly excluded the evidence of the settlement of white men in the region of country where the trading took place. The question of whether there were one or thirty other white men between Benton and Camp Cook would not determine the point as to whether it was an Indian country or not.

The claimants, then, were trading with the Crow Indians, at or near Camp Cook, and purchased the articles seized from them, and had no license or authority to trade with Indians from the proper department of the government, as required by law, if the country where the trading took place was Indian country.

If the place where the trading occurred was Indian country, then the goods were liable to seizure. If it was not, then they were not. This, then, is the question to be determined -- was Camp Cook in what is known in law as the Indian country?

Section 1 of an act to regulate trade and intercourse with Indian tribes, and to preserve peace on the frontiers, reads thus:

"That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisana or the Territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any State to which the Indian title has not been extinguished for the purposes of this act, be taken and deemed to be the Indian country." 4 U. S. Stat. at Large, 735. § 1.

All the country embraced within the limits of Montana Territory, according to the provisions of this act, for the purposes of Indian intercourse, must be classed as Indian country. It is claimed by the appellants that the organic act of Montana repealed this law as far as this Territory

is concerned. It does not do so in express terms; it must do so by implication if at all. The law does not favor a repeal of a statute by implication. A subsequent statute to have this effect on a previous one must be wholly inconsistent and incompatible with it. It cannot be possible that both statutes should stand without a palpable conflict between them. If one statute is thus inconsistent with another, then it repeals it by implication. If one statute conflicts with a portion of another so as to exhibit an inconsistency, then the inconsistent portion of the previous statute cannot stand, and is said to be repealed by implication. When two statutes conflict, the subsequent repeals the former by implication only so far as it conflicts therewith.

How, then, does the organic act of this Territory create such a conflict in the Indian intercourse act as to render them so inconsistent and contradictory that they both cannot stand, or that that portion of the Indian intercourse act which requires persons trading with Indians to procure a license must be considered as repealed. It may be true that the creation of a territorial government by that organic act virtually gave permission to people to come here and live; and if persons have permission to come to this Territory and live, they must have, as a necessary result, the right to bring here the necessaries and comforts of life. Hence, that portion of the Indian intercourse act which gives power to the agents of the Indian department to expel persons from the Indian country, and to prevent citizens or others from bringing here the necessaries or comforts of life, must be repealed. But I can see no conflict between these rights claimed under the organic act and the requirements of the government, that those who trade with Indians must have a license therefor. It is not at all necessary to the comfort or happiness, much less the existence of the people of this Territory, that they should have the right to trade with Indians without license. They can enjoy about all of the rights of the citizens of other communities without this right, and hence I am unable to see how our organic act so

conflicts with that law requiring the Indian trader to procure a license.

It is very probable, however, that the portion of country where Camp Cook is situated is Indian country, in the fullest acceptation of the term. In 1855 the government of the United States, through its commissioners, A. Cummings and Isaac I. Stephens, made a treaty with the Blackfoot and a number of other tribes. Article 4 of that treaty reads as follows:

"The parties to this treaty agree and consent that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell river; thence down said river to its mouth; thence down the channel of the Missouri river to the mouth of Milk river; thence due north to the forty-ninth parallel; thence due west on said parallel to the main range of the Rocky Mountains; and thence southerly along said mountains to the place of beginning, shall be the territory of the Blackfoot nation, over which said nation shall exercise exclusive control, excepting as otherwise provided in this treaty." See 11 U. S. Stat. at Large, 657, § 4. Camp Cook is within the limits described.

I am unaware that this treaty has ever been abrogated or annulled by the United States. Certainly our organic act does not purport to.

This is a portion of section 1 of our organic act:

"That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory, but shall be excepted out of the boundaries and constitute no part of the Territory of Montana, until said Indians shall signify their assent to the president of the United States to be included within said Territory, or to affect the authority of the United

States to make regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed."

Much may be included under the two heads, rights of person and rights of property. And I think we may safely say, that the right stipulated in this article of the treaty above referred to, which sets apart a particular described country, and provides that it shall be considered that of the Blackfoot nation, over which they shall exercise exclusive control, gives to them a right which this proviso in our organic act was intended to protect. By that treaty the United States government makes that region of country the home of the Blackfoot nation; the place where they have the right to live and pursue their avocations; a region to which the United States, by a long-continued policy in treating with Indian tribes, recognizes that the Blackfoot nation have some right, and which must be extinguished by treaty. The article seventh of the treaty of Cummings and Stevens, above referred to, provides that white men may pass through and live in this country. We are not aware that, by any treaty with the Blackfoot nation, this region of country was to be excluded out of any State or Territory; hence we infer that it must be considered as within the limits of Montana Territory. The whites, then, who live in this region are subject to the laws of this Territory; they are within its jurisdiction.

This may seem to be inconsistent with the terms of that treaty, which gives to the Blackfoot nation the right to exercise exclusive control over that region, except as otherwise provided therein.

It is not to be presumed, however, that the United States intended to give to that people the right to force white men, who might live within the borders of their country, or who were passing through the same, to comply with and adopt their customs and tribal regulations. The United States have always claimed the right to make those who were living in the Indian country amenable to its laws.

The only thing that was intended then, by this clause in that treaty giving them the exclusive control over that region, was to exclude the right of the United States to interfere therein with the customs and tribal relations of that nation. It may be said, then, that this region of country is that of the Blackfoot nation — an Indian tribe; and, if there is any such thing as an Indian country in the United States, it must be classed as such.

There is another clause in the proviso in our organic act above referred to, that requires notice. It is that clause which provides that nothing in the act shall be so construed as to affect the authority of the government of the United States to make regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed.

Here is a direct reservation of the right to make regulations respecting the Indians within this Territory. The reason why one statute is said to repeal another, by implication, is, because it is held that the legislative body that enacted the subsequent statute must so have intended to do. Here, any intention of congress to annul the laws upon the subject of Indian intercourse is especially controverted, by a reservation of the right to the general government to regulate it.

Camp Cook, then, I consider for the purposes of Indian intercourse with the whites, is Indian country. These goods were traded for in an Indian country, by persons who had no license to trade with them, and, hence, were properly seized.

Judgment of the court below is affirmed with costs.

Judgment affirmed.

DAVIS, appellant, *v.* HENDRIE, respondent.

STATUTORY CONSTRUCTION — *act prescribing rate of interest.* Under the second and third sections of the "Act to prescribe the rate of interest," the legislature has given the parties to promissory notes the power to fix the rate of interest that may be collected, after the maturity of the note, as stipulated damages.

STATUTORY CONSTRUCTION — *interest on contracts.* The second section of the act relating to interest fixes the rate of interest on contracts that are due, where there is no agreement as to the rate thereof, and does not affect contracts that are to become due.

STATUTE — *agreement.* A statute cannot be varied by the agreement of parties.

PROMISSORY NOTE — *interest after maturity — damages — penalty.* A promissory note, in which the maker agrees to pay "interest after maturity, at the rate of four per cent per month until paid," is an agreement between the parties to liquidate the damages for a breach of the contract. This interest is not fixed as a penalty for the breach of the contract, and the agreement will be enforced by the courts.

Appeal from the Third District, Lewis and Clarke County.

JUDGMENT was rendered in December, 1871, by WADE, J. The facts appear in the opinion.

E. W. TOOLE, for appellant.

The Montana statute leaves the rate of interest on written obligations to be regulated by the parties. Acts 1865, 535; 2 Sto. on Cont. 1028.

The parties to the note sued on contract, especially and exclusively, for interest after maturity. Is this good? *Hand* v. *Armstrong*, 18 Iowa, 324; *Lucas* v. *Pickle*, 20 id. 490; *Payne* v. *Clark*, 23 Mo. 259; *Robinson* v. *Kinney*, 2 Kan. 184; *Searle* v. *Adams*, 3 id. 515; *McLane* v. *Abrams*, 2 Nev. 199; *Kohler* v. *Smith*, 2 Cal. 597; *Ludwick* v. *Huntzinger*, 5 Watts & Serg. 60.

SHOBER & LOWRY, for respondents.

The contract for interest ceases with the maturity of the note. An agreement to pay interest after maturity is without consideration. The measure of damages on promissory notes after maturity is the legal rate of interest, ten per

cent per annum. Acts 1865, 535; *Talcott* v. *Maston*, 3 Minn. 344; *Brewster* v. *Wakefield*, 22 How. (U. S.) 118.

KNOWLES, J. The plaintiff brought an action to foreclose a mortgage executed to secure the payment of a promissory note for the sum of $1,725. A copy of the note is not set forth in the record. Its substance is, however, presented in plaintiff's complaint. From this we find that the defendants promised to pay the above sum in six months, with interest after maturity at the rate of four per cent per month.

The court below held that an agreement for interest was invalid and void on contracts due, and refused to allow the same. To this ruling the plaintiff excepted, and appealed to this court, assigning this ruling as error.

The question presented for determination in this case is the validity of a contract for interest on a sum of money after the same becomes due. Section 2 of our statute upon the subject of interest, reads as follows: "Creditors shall be allowed to collect and receive interest, when there is no agreement as to the rate thereof, at the rate of ten per cent per annum after they become due on any bond, bill, promissory note, or other instrument in writing." See Laws of 1864, 535.

Section 3 of the same act reads thus: "The parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein the payment of a greater or higher rate of interest than ten per cent per annum, and any such stipulation contained in any such instrument of writing may be enforced in any court of law or equity of competent jurisdiction in this Territory." See Laws of 1864, 535.

It will be seen by the section first referred to, that the law only allows interest in this Territory on a promissory note after the same has become due, in the absence of any agreement between the parties upon that subject.

The second section referred to provides, that the parties to a promissory note may agree for the payment of a greater

rate of interest thereon than ten per cent. Taking these two sections together and the conclusion is inevitable that the legislative assembly intended to give parties to promissory notes, and other instruments of writing, the power to agree upon the amount of interest that might be collected by way of stipulated damages after the maturity of the contract. and I can see no reason why a different rule should be established in a case where the legislative assembly enacts what shall be the interest collected by way of damages, and where it authorizes the parties to make a stipulation as to what interest will be proper as such damages. Interest allowed by law on contracts due is treated and considered as damages for a breach of the same over and above the amount actually due. When the legislature, however, fails to enact what shall be the legal damages for a breach of a contract, over and above the demand due, there is no good reason why the parties may not agree as to what shall be proper damages, and if I have not given a wrong interpretation to section 3 above referred to, the statute gives them this authority. The rule claimed by the respondents makes that section read, "that parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein the payment before the same becomes due for a greater rate of interest than ten per cent per annum, but after they become due no stipulation of the kind can be made." And section 2 must be so construed as to leave out the clause when there is no agreement as to the rate thereof, and be read as follows: "Creditors shall be allowed to collect and receive interest at the rate of ten per cent per annum after they become due on any bond, promissory note, or other instrument in writing." For, if parties cannot agree to any rate of interest after such an instrument becomes due, the clause "where there is no agreement as to the rate thereof," can have nothing to do with an instrument in writing due; and yet the whole section has reference to interest on contracts due and not to those to become due.

It is claimed by the respondent that any agreement for interest on money after the sum becomes due is invalid,

and, in support of this, we are cited to the case of *Talcott* v. *Marston*, 3 Minn. 344. The court in that case uses the following language:

"The promisor agrees to pay five per cent per month after due till paid. If this can be construed as a contract it is certainly not the same in kind as that embraced in the first part of the note. There is, in fact, no consideration for it. There is no time limited for the expiration of the contract. It is claimed that the parties have agreed to pay five per cent for such length of time as the payee may choose to forbear. But the fact that the parties have agreed in writing that the money should be paid at a day certain, excludes the idea that there could have been another understanding different from that expressed. This five per cent cannot be claimed as interest, for interest is the sum paid for the use, or, as is sometimes expressed, for the forbearance of money. In this case there is no agreement that the maker shall have the use of the money, or that the payee will forbear in collecting the money after six months. The last clause of the note is not, in terms, but in substance and effect, an attempt of the parties to liquidate the damages for a breach of the contract. This the law does not permit them to do. The reasoning upon which this rule of law has been established is entirely unsatisfactory to my mind, and I think an agreement of parties, deliberately entered into and fully understood, to liquidate the damages on breach of contract to pay money, ought to be enforced as much as any other contract. But the rule has long since been settled otherwise, both in England and this country, and the question is not open for discussion. And whether the five per cent clause be regarded as a penalty or liquidated damages the result is the same."

I have quoted this decision at such length because it is the one most in point cited by respondents, and it is the one upon which the decision of the court below was evidently based. We have not the Minnesota statute upon interest before us, and hence cannot tell to what extent it corresponds with that of this Territory. If the statute of that

State fixes the rate of interest on all moneys due, then there was nothing left for agreement, and I fully indorse that opinion; for parties by agreement cannot vary the law. If the statute of Minnesota on this subject is the same as ours, and the rate of interest on money due is fixed by law only in the absence of any agreement then I wholly dissent from the conclusion arrived at therein. The contract in this case was for four per cent per month after the note became due. This was in effect and substance an agreement between the parties to liquidate the damages for a breach of the contract. Interest is often treated as damages. When the law gives interest on money due, it is not in consideration of any forbearance by the payee, but as damages. Now, we hold that the rule laid down in the decision above referred to, that parties cannot agree and liquidate damages for a breach of a contract, is not correct. In Sedgwick, on the measure of damages, we find the following:

"It is competent for parties entering upon an agreement to avoid all future questions as to the amount of damages which may result from the violation of the contract, and to agree upon a definite sum as that which shall be paid to the party who alleges and establishes the violation of the agreement. In this case the damages so fixed are termed liquidated, stipulated or stated damages." The author, in that work, discusses this question of liquidated damages, and refers to many cases both in England and America where contracts, fixing a sum as stipulated or liquidated damages, have been sustained, and holding that the courts will enforce such a contract when it is not in the nature of a penalty. We do not believe that the interest agreed upon by the parties in the note under consideration, can, by any fair construction, be considered as a penalty. The rate of interest agreed upon was not in excess of the amount paid on very many contracts executed at the time of this one in this Territory. The agreement has none of the earmarks of a penalty. A note in Sedgwick, on the measure of damages,

in relation to the decisions of the courts of Minnesota, referred to by respondents, holds this language.

"But these rulings seem practically to conflict with the enlarged policy of the statute, and perhaps also tend to discourage that good faith in dealing which it should be the sedulous endeavor of the jurisprudence to promote. They allow the debtor by a breach of his contract to obtain for a time the use of his creditor's money, at a rate less than he agreed to pay, and one which it may be far less than it could be had for in the market, and which no degree of good faith would have enabled him to obtain."

As we have said, however, we have no contest with the Minnesota decisions upon this point, if their statute fixes the rate of interest on money due and does not leave same open to contract. The case of *Brewster* v. *Wakefield*, 22 How. (U. S.) 118, cited by respondents, is not in point. In that case no agreement for the payment of interest after the note became due was made, and the court held that in the absence of an agreement between the parties as to interest after the maturity of the note, only legal interest could be collected.

In the case of *McLane* v. *Abrams et al.*, 2 Nev. 204, the court says:

"As in the absence of express provisions it could not be presumed that the promise of a party extends beyond the limit of the written contract for payment, the statutes existing in all the States give the party a remedy which otherwise he probably would not have, by allowing him to recover legal interest on his debt from the time of its maturity until it is collected, as damages for the breach of contract. But it will not be denied that when not prohibited by usury laws, an agreement between parties fixing a higher rate of interest or damage after maturity would be enforced."

The statute upon the subject of interest in Nevada upon this point is the same as that of this Territory.

In conclusion, we would add there is no doubt that the law allows parties to fix the damages that may be sustained for the breach of a contract. The only question to be determined by courts is, whether or not the parties have fixed

the same by agreement. Where interest is allowed by law on contracts due, and where the court awards interest for the breach of a contract, this interest is given as damages.

When the law does not fix the rate of interest on contracts due, or specially provides, as I hold the statute of this Territory does, that parties may agree as to the rate of interest, this interest agreed upon is treated as damages; and, if it is not fixed as a penalty for the breach of the contract, but as a just compensation therefor, the courts should enforce it. The contract for interest in this case cannot be treated as a penalty; the parties did not so understand it themselves; no fair interpretation of the contract can discover any such understanding. If the interest agreed upon is to be regarded as a penalty, then the court below erred in fixing the damages for the breach at the legal rate of interest, because the statute fixes the interest only in the absence of agreement; and in this case there was an agreement, and the question should have been determined on the testimony as to what were the actual damages, and the plaintiff might have recovered any amount he could have proved, not exceeding the four per cent per month stipulated for. This, however, I hold, was not fixed as a penalty.

For these reasons the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

MURPHY, J. I concur in the conclusions arrived at in the above opinion.

WADE, C. J., dissenting. The note sued upon in this case is a promise to pay a certain sum of money in six months after date, and then follow these words, "together with interest after maturity, at the rate of four per cent per month until paid," and by virtue of the foregoing words the plaintiff seeks to recover four per cent per month upon the principal of the note, from and after its maturity to the time of the rendition of the judgment. I do not understand that he claims this as liquidated damages for breach of contract, or as a penalty for; if any such claim was

made, it should be properly plead, but he claims it as *interest*, under and by virtue of the statute of the Territory authorizing parties to contract for a higher rate of interest than ten per cent per annum.

It is true enough that our statute authorizes and legalizes any rate of interest the parties shall mutually *agree* upon, but, if a party recovers five times the amount of interest that the legislature thought just and reasonable, he must do so by virtue of a *contract*, clear, explicit, certain, definite and positive, and upon the construction of which there can be no doubt. If a party so victimizes himself by his promise, he must do so in unmistakable terms. No doubtful construction can be given in favor of a contract of this grasping, unconscionable character. Courts cannot supply defects or deficiencies in an agreement of this character; they will not exhaust their ingenuity to find a consideration for such an agreement. The party must stand or fall by the words of his bond, for there is no equity in his cause to supply defects.

The simple inquiry presented by this record is this. Do the words above set forth constitute a *contract* with all its elements and parts, and such a contract as can be enforced? By virtue of these words did the maker of the note agree to pay interest for a single moment after the note became due, and did the payee agree to forbear and waive his right to collect the money an instant after the maturity of the note? We say there was no agreement to delay, and, so far from that, there was an express written agreement to the contrary. Can it be said the note is to run for an indefinite time, simply at the will of one of the parties against the wishes of the other, and in consideration thereof the four per cent per month is to be paid? This could not have been contemplated by the parties, for the express and direct promise is to pay at the end of six months, and when that time arrived payment could have been enforced at once, notwithstanding the pretended agreement as to interest, thus showing that there could have been no valid agreement that the note was to run for an indefinite period after its maturity. The fact

that the time of payment was fixed in writing in the note, precludes the idea that there could have been a parol verbal agreement to extend the time; and the only agreement to extend the time must be found in the words above set forth, which say nothing about further time and make no intimation of delay in collecting the note.

Then, in the absence of any agreement upon the subject, if the note is to run after its maturity at four per cent per month, how long is it to run? There is no contract on this subject. The minds of the parties have not met and mutually consented to any thing upon this point; on the contrary, they fix a definite certain time when the note shall be paid, and when that time arrives payment can be enforced at once. The maker says I will pay this note at the end of six months, and the payee says you can have the money for just that time and no longer. This is the contract of the parties, simple, definite and certain, and we are asked to extend this six months' contract over a period of more than two years, when such a thing was not dreamed of by either of the parties, and the court is called upon to make a contract for the parties where they have failed to make it themselves and to which they are utter strangers.

Then how long shall the note run after its maturity? If the court is to make a contract for the parties upon this subject, it may fix any arbitrary time in the future. The parties have said the money shall be paid in six months, and if there is delay an instant beyond that time, it is wholly at the will and pleasure of either party without the consent of the other. This does not make a contract. This would authorize one party to make a contract for himself and another without the other's consent. There is no mutuality in such a contract and no consideration for it, and to galvanize these words as to interest into a contract, the court must say that for a sufficient consideration the parties expressly agreed that the note should run after its maturity for an indefinite period, depending upon the will of either party, when in truth such an agreement is a direct contradiction of the written terms of the note.

This money is sought to be collected as interest. What is interest? It is money paid for the forbearance of money. Here there is no agreement to forbear longer than six months. At the end of that time the contract ceases. The parties promise with express reference to this time, and there is no contract to extend the time. If there is no agreement to forbear longer than six months, then the party can only recover statutory interest after that time. These words as to interest do not continue the written contract, and they furnish no protection as to one of the parties and no guarantee as to the other. They do not change, vary or modify the absolute contract of the parties, and are not an agreement in and of themselves.

The evident design of this language was to terrify the maker of the note into a performance of his contract by threatening him with pains and penalties if he failed, but pains and penalties are not enforced in this manner. If the party failed to comply with his contract, the plaintiff had his remedy. He could have collected his money at the maturity of the note, and if he failed to do so it is his own fault and his own neglect.

This four per cent per month after maturity cannot be claimed as liquidated damages, for the reason that the words set forth do not make a contract, and for the further reason that liquidated damages are a certain fixed and definite sum, while four per cent per month for an indefinite period, depending upon the will or caprice of one of two parties, is about as uncertain as any thing imaginable.

For these reasons we think interest on the note should be computed at ten per cent per annum after its maturity. And for these reasons I am unable to agree with the majority of the court upon the question in this case.

BULLARD, respondent, *v.* GILETTE, appellant.

PLEADING — *failure to deny complaint.* The material allegations of the complaint are admitted if the answer does not deny them.

UNDERTAKING ON APPEAL — *liability of sureties — defense to action.* If the sureties in a written undertaking on appeal agree to pay a judgment that has been rendered in the district court, if the same should be affirmed by the supreme court of the Territory, an action can be brought against one of the sureties when the judgment has been so affirmed; and in this action, the facts that an appeal has been properly taken from the supreme court of the Territory to the supreme court of the United States, and that proceedings have been legally stayed on the judgment, do not constitute a defense.

REMEDY — *undertaking — judgment.* A creditor can pursue one or both of his remedies by a suit on the undertaking or an execution on the judgment.

Appeal from the Third District, Lewis and Clarke County.

IN March, 1872, the court, WADE, J., entered judgment for Bullard on the pleadings. The facts appear in the opinion.

CHUMASERO & CHADWICK, for appellant.

No action could be commenced on the undertaking on appeal from the district court to the supreme court, until the appeal from the supreme court of the Territory to the supreme court of the United States had been finally determined, and a mandate had been transmitted from the supreme court of the United States to the supreme court of the Territory.

The motion for judgment was made on the pleadings, and thereby concedes the facts in the complaint and answer to be true. It is admitted that a supersedeas was granted and all proceedings on the judgment were stayed until the supreme court of the United States determined the appeal, and that no mandate was ever sent to the supreme court of the Territory. Respondent had no right to bring his action on the undertaking sued on. Appellant is thereby deprived of the remedy of appeal given by the organic act and the judiciary act of 1789. Organic Act, § 9; 1 Brightly's Dig. 257, 258; Judiciary Act, §§ 2, 3.

If respondent can proceed on the undertaking, how does the supersedeas protect appellant? If the respondent collects the money, and the judgment is reversed by the supreme court of the United States, what is the remedy of appellant? If respondent has removed or is insolvent, appellant would be remediless. This cannot be the law.

The New York cases referred to by respondent are not applicable. The New York Code providing for appeals is different from the judiciary act of 1789.

No decision can be found that will support the judgment in this case.

W. F. SANDERS, for respondent.

The undertaking sued on is an agreement to pay money on the happening of a specified contingency. It is a bond with a condition. If the contingency has happened, the agreement to pay has become absolute.

The answer denies nothing in the complaint, and confesses all. Appellant admits that the judgment is in full force, unreversed.

A further appeal is no defense. The liability of appellant is on his bond, which is the measure of his liability. It does not stipulate that he shall not pay if there is a further appeal. The answer does not allege that the appeal was yet pending or the judgment reversed. *Caldwell* v. *Gans*, *post*, 570.

The remedies on bond and judgment are independent. *Many* v. *Sizer*, 6 Gray, 141.

MURPHY, J. This is an action brought by the plaintiff, as trustee of an express trust, against the defendant, as one of the sureties on an undertaking on appeal, for the recovery of the balance due on a judgment rendered by the district court of the third judicial district, in the case of *Charles W. Marden* v. *George Plaisted and R. R. Wheelock*.

From that judgment the defendants took an appeal to the supreme court of the Territory, for which the defendant in this action executed the undertaking sued upon.

On the hearing in the appellate court, at the December term, 1868, the judgment below was affirmed, and a further appeal taken to the supreme court of the United States.

In January last the present suit on the undertaking was instituted, and in March last the case was heard upon plaintiff's motion for judgment upon the pleadings, on the ground that the answer set up no defense to the cause of action, the motion sustained and judgment rendered accordingly in favor of plaintiff for $4,325.16, to which defendant excepted and has appealed to this court. And the only question for our consideration is, whether or not the answer is a valid defense.

The complaint, among other things, alleges the execution, delivery and filing of said undertaking, "wherein and whereby the said Gilette and Nowlan, for the consideration aforesaid, did severally undertake and promise and acknowledge themselves severally bound in the sum of $6,500, that if the said judgment of said district court so appealed from, or any part thereof, should be affirmed, the said Plaisted and Wheelock should pay the amount directed to be paid thereby, or the part of such amount as to which the same should be affirmed, if affirmed only in part, and all damages and costs which should be awarded against said appellants upon the appeal."

And it also alleges the affirmance of the judgment of the court below by the appellate court, at the December term, 1868, and that the same "yet remains of record in said court, in full force, unreversed and wholly unsatisfied," except as to the amount of $679, collected by execution and credited upon it.

And it further alleges the sale, assignment and transfer in writing, by said Marden, of "the judgment aforesaid, with his interest in the undertaking aforesaid, and all moneys due or to become due thereon," to one Hill, from him to one Charles W. Marden and wife, and from them to the plaintiff, expressly in trust, to secure an indebtedness from them to one Woolfolk, and the acceptance and holding of said

last-named assignment by said plaintiff in trust as aforesaid.

The answer does not deny these allegations, but sets up in defense the following facts, to wit:

1. The appeal of Plaisted and Wheelock from the judgment of the supreme court of the Territory to the supreme court of the United States.

2. The execution of a proper bond on said appeal.

3. The stay of proceedings on said judgment, and the granting of a supersedeas by the first appellate court.

4. The issuance of no mandate or remittitur from the last to the first appellate court, nor from that to the said district court.

5. The remaining of said judgment in this court, stayed by the order of the court, by the bond on appeal and by the supersedeas, and the want of jurisdiction of said district court.

Now, do these facts constitute a sufficient defense or bar to the action?

As will appear from what has already been shown, the answer, by failing to deny, under our system of pleading, for the purposes of the action, thereby admits all the material allegations of the complaint, and upon which the cause of action is founded, but seeks to avoid or destroy their legal effect by interposing and setting up another and different state of facts.

It purports to be a confession and avoidance, or in the nature of such, yet, while it confesses every thing necessary to a recovery, does it in fact avoid any thing?

Notwithstanding the averment of appeal to the supreme court of the United States, it admits the judgment, for the payment of which the undertaking was entered into, to be still "in full force and unreversed."

And, although it avers that no mandate or remittitur has been issued to the courts below, yet, it fails to allege that said appeal is still pending, or that the case has been reversed.

If a further appeal is a defense at all, it must be a com-

plete defense, and every fact necessary to make it such must be averred.

But can it be a sufficient defense in this case? The defendant must stand or fall by this bond he has voluntarily executed.

The obligation to pay grows out of the term of the undertaking itself, and it alone must be the measure of the defendant's liability.

It is nowhere agreed, that in case of a further appeal, he shall not pay, nor does it show, or can it be inferred, that any such thing was ever contemplated, or if so, was in any way intended to affect the obligation.

From an examination of the undertaking, as recited by the complaint, it is found to be an express agreement to pay money on the happening of a particular event therein specified.

The obligation depends upon a certain contingency, and must be interpreted by the same rules of law as govern the construction of a bond with a condition affixed.

The condition here is to pay, if the judgment below should be affirmed above.

The judgment was affirmed, the payment has not been made, and the condition is broken.

The contingency no longer exists, the event upon which it depended has transpired, and the failure to perform the stipulation is a breach of the contract.

Therefore, the liability of the defendant has attached, and the agreement to pay has become absolute.

And as the right of action on a bond or undertaking, and an execution on the judgment are independent remedies, and the one is not a substitution for the other, and the creditor may pursue either or both at his election (6 Gray, 141), this action was properly commenced, and the court had jurisdiction of the case.

Judgment affirmed.

PARKS, appellant, *v.* BARKLEY, respondent.

PLEADING—*forcible entry—answer—issue of title.* In an action of forcible entry and unlawful detainer, an allegation in the answer that the defendant was in the actual possession of land and entitled to such possession, does not raise the issue of title.

PLEADING—*conclusion of law.* The averment in an answer, that a party is entitled to the possession of land, is a conclusion of law.

TITLE TO LAND—*prior appropriation.* The first appropriator of land in this Territory acquires a title to the same, which is valid against all persons except the United States and its grantees.

PLEADING—*forcible entry—title—gist of action.* In the action of forcible entry and unlawful detainer, the question of title is an immaterial issue; and the gist of the action is the actual possession of the premises by the plaintiff, and his forcible ejection from the same by the defendant.

Appeal from the First District, Jefferson County.

IN May, 1872, the court, MURPHY, J., dismissed this action, and Parks appealed. The facts are stated in the opinion.

G. G. SYMES and A. G. P. GEORGE, for appellant.

The court erred in dismissing this action. The pleadings do not raise the question of title. The complaint is in the usual and proper form. 2 Estee's Pl. 520.

The question of title cannot arise in a forcible entry and detainer case. The object of the law is to prevent the disturbance of the peace by the forcible assertion of a private right. The proof of title does not affect the case. *McCauley* v. *Weller*, 12 Cal. 524; *Mitchell* v. *Davis*, 23 id. 381; S. C., 20 id. 45. The fact of possession, and not the right of possession, is the issue to be tried.

The averment of title in this case may be treated as surplusage, and a denial thereof raises no material issue. *More* v. *Del Valle*, 28 Cal. 170. If the plaintiff relies on a forcible entry, the defendant will not be permitted to introduce evidence of title to the premises. *Thompson* v. *Smith*, 28 Cal. 532.

The question of title is not raised by the pleadings in

this case. If a party appears, answers and tries his case in the justices' court, and makes no motion to dismiss the case, he cannot make such a motion for the first time in the district court.

SHOBER & LOWRY, R. H. WILLIAMS and E. W. TOOLE, for respondent.

The pleadings put in issue the possessory title. A justice of the peace cannot inquire into this title. Organic Act, § 9.

This is not an action of forcible entry and detainer. No demand for restitution is made. There is no allegation that respondent is in possession of the premises. The complaint asks damages for destroying a foundation of appellant. It is trespass. 2 Bish. on Crim. Law, 421.

If appellant claims damages for the destruction of a building, he must show the amount of his interest in the building. 2 Estee's Pl. 409, § 10.

The owner of land can use such force as is necessary to prevent a person from acquiring possession. *People* v. *Payne*, 8 Cal. 341; *McCarty* v. *Fremont*, 23 id. 196; *Hoag* v. *Pierce*, 28 id. 188.

When the title to land is involved, the justice must certify it up. *Dickson* v. *McGuire*, 9 Cal. 46; *Cullen* v. *Langridge*, 17 id. 67; *Henderson* v. *Allen*, 23 id. 519.

In a mere action for damages to land the question of title is involved. A party is not answerable in damages to one who has no right to the premises, and is himself a tort-feasor. The title of the owner would be a good defense to an action brought for damages by the wrongful possessor. Hill. on Juris. 299.

An entry upon premises by tearing down a foundation, is a trespass to the realty. 1 Bish. on Crim. Law, 419.

KNOWLES, J. This was an action of forcible entry and unlawful detainer. The complaint is in accordance with the precedents, and states facts sufficient to constitute a cause of action. The cause was tried before a justice of the peace,

and a verdict rendered for plaintiff and judgment entered accordingly. From this judgment the defendant appealed to the district court for Jefferson county. The defendant renewed a motion before the district court he had made in the justices' court for a dismissal of the cause of action, for the reason that the question of title had been raised by the pleadings. The court sustained this motion and dismissed the cause, to which ruling the plaintiff duly excepted, and brings his appeal to this court, assigning this ruling as error.

The first question for us to determine is, was the question of title to the real estate about which this controversy occurred, raised by the pleadings. The complaint shows that the plaintiff was in the actual, peaceable and quiet possession of the piece of land described in the complaint on a certain day, that on that day, while plaintiff was in possession thereof, the defendant, with violence and strong hand, entered thereon and forcibly ejected him. Nowhere in the complaint is there any allegation of title, or any allegation that, by any construction, can be construed into an allegation of title.

The answer denies the allegations of the complaint, and alleges that the defendant was in the actual, quiet and peaceable possession of the property described, and that while so in possession the plaintiff entered, and he used only such force as was lawful and necessary in ejecting him. The only allegation in the answer which respondent claims raises the issue of title is the following:

"That on the said 5th day of April, A. D. 1872, and for a long time prior thereto, this defendant was in the actual, peaceable and quiet possession, and now is entitled to the actual, peaceable and quiet possession thereof of all that certain piece or parcel of land in said complaint described, save and except about three feet thereof next adjoining the hotel of said plaintiff."

There is no other allegation in the answer which there can be the slightest pretense made for as raising the question of title. This one most assuredly does not. The allegation that the defendant was in the actual possession of the prop-

erty does not show that he had title to the property. The defendant may be a tenant or a trespasser and be in the actual possession of the property. The allegation of the right to the possession is an allegation of a conclusion of law. The right to possession depends upon certain facts, and these are not alleged. The allegation that a man is in the possession of property does not show that he is entitled to the possession. If such an allegation as that was sufficient, all that a party litigant would be required to do would be to prove it, and no matter how wrongfully he might be in possession, how much of a trespasser, he would be able to show that he was entitled to the possession. The fact that much of our real estate in this Territory has been held by a possessory title, makes no difference. The theory under which such titles are sustained is that the first appropriator does acquire title to the land he appropriates as against all persons but the government of the United States, and that should the government of the United States, or no one under it, ever assert title to the property, he would have the absolute title. He who has the right to the possession of real estate has a title in or over it. And a person to show that he is entitled to the possession of real estate must prove that he, or some one under whom he claims, had appropriated the ground, or had title of which he has possession. Prior possession, of course, is evidence of title, or of appropriation. For these reasons we do not think the question of title was raised by the pleadings.

In the second place I hold that if the answer does present the issue of title, it was an immaterial issue. The gist of the action of forcible entry and unlawful detainer is: Who was in the actual possession of the property, and was the person so in the actual possession of the property forcibly ejected therefrom by the defendant? The object of this action is to prevent men from taking the law into their own hands and seeking to set themselves right by force. A defendant may have the title to property and be justly entitled to the immediate possession thereof, and the possession of the plaintiff ever so much of a wrong, yet the law will not

allow the defendant to right himself by force. If it was permitted, there would be no end to breaches of the peace and personal contests about the possession of real property. Hence it is no answer to the charge, that while the plaintiff was in the actual possession of the property, the defendant entered and forcibly ejected him, for the defendant to say I owned the property and had a right to the possession thereof at the time and did nothing but what was necessary to regain my rights. The law, as I have said, will not permit a man to regain his rights by force. The law furnishes him a remedy for his rights in the action of ejectment.

For these reasons I think the court erred in its ruling. The judgment of dismissal is reversed, and the cause remanded.

Judgment reversed.

DONNELL et al., appellants, *v.* **HUMPHREYS**, respondent.

EVIDENCE — *appurtenance — grant.* Extrinsic evidence is admissible to show the nature and extent of an appurtenance, which passes with the principal thing granted.

APPURTENANCE — *grant of water ditch.* A water ditch cannot be appurtenant to another water ditch and pass as an incident thereto under a grant of the same.

PAROL EVIDENCE — *written instrument — deed — intention of parties — language.* Parol contemporaneous evidence is not admissible to contradict or vary the terms of a valid written instrument, but such evidence is competent to enable the court to ascertain the intention of the parties to the deed, and make certain the language respecting its subject-matter, and give effect to the deed.

GRANT OF WATER DITCH — *rights and incidents.* The grant of a water ditch, by general words, includes the excavated channel, the rights to the water by which it is supplied and made valuable, and another ditch which conveys the water to it.

APPURTENANCE — *part of subject-matter.* The law distinguishes between that which passes as an appurtenance, and that which passes as a part of the subject-matter.

DEED — *extrinsic evidence of ditches described.* In determining what property is conveyed by a deed, which describes the same as "the ditches known as

the Silver Bow Company's ditches," "and more particularly known as the Humphrey and Allison ditches," the court should consider extrinsic parol evidence, tending to prove that the ditch known as the "Park ditch" was one of the said ditches; that it was necessary to convey the water to the said ditches; and that the said ditches would be of no value without the "Park ditch."

Appeal from Second District, Deer Lodge County.

IN September, 1871, the court, KNOWLES, J., entered judgment in favor of Humphreys. The facts are stated in the opinions.

SHARP & NAPTON, for appellants.

The court should interpret and construe the deed, after knowing what property is referred to. It is to be construed in the light of surrounding circumstances in order that the intent and meaning of the parties should be perfectly understood. 1 Greenl. Ev., § 277.

It is not attempted to contradict or vary the language of the deed by parol evidence, but to explain and ascertain the subject-matter of the same. 1 Greenl. Ev., § 286 *et seq.*

After the jury had reported the facts to the court, relating to the Park ditch, the water conveyed by it, the relation of the other ditches to the same, and the value of the property with and without the Park ditch, the court could intelligibly construe the deed and gather the intent of the parties thereto. The evidence tending to show the above facts is material and should have been admitted. *Tabor* v. *Bradley*, 18 N. Y. 112–115; *Myers* v. *Ladd*, 26 Ill. 415; *Grant* v. *Chase*, 17 Mass. 445.

The Park ditch was conveyed as part and parcel of the granted property, or as appendant and appurtenant to the same. Such a construction by the court does not contradict or vary the language of the deed.

The court erred in excluding the evidence showing that the possession of the Park ditch was delivered to appellants at the time the deed was executed. 2 Greenl. Ev., title Ejectment; *Huttmerer* v. *Albro*, 18 N. Y. 51; *Plumb* v. *Cattaraugus C. M. I. Co.*, id. 392.

The cases above cited show this action is properly brought, and not an action to amend the deed, as contended. No objection having been made in the lower court to the joinder of causes of action, it cannot be made for the first time in the supreme court.

The language of the deed is simply "water from Silver Bow creek." That expression *per se*, in reference to mining water rights, needs explanation. Frequently water rights of a ditch are artificial and constitute its only value. The deed does not say natural water of Silver Bow creek; consequently to construe the deed to cover artificial water would not contradict or vary its language.

The admissibility and materiality of the evidence are the only questions before this court, and not the effect of the same.

Counsel cited, as to description of property in a deed, 2 Whart. 622–630; 4 Kent's Com. 563–569; 4 Cruise's Dig. 203, 206, 226.

CLAGETT & DIXON, for respondent.

The complaint claims the Park ditch as a tributary, not as an appurtenance or right. The deed says nothing about tributaries.

The deed was plain on its face, and parol evidence was not admissible to vary or contradict it. As to when parol evidence is admissible to explain writing, see 1 Greenl. on Ev., §§ 277, 282, 283; 2 Pars. on Cont. 547, 563, 564. Parol evidence is inadmissible to vary the terms of a written contract to make it embrace property not described therein. 2 Washb. Real Prop. 636; *Osborn* v. *Hendrickson*, 7 Cal. 282.

Land can never be appurtenant to land, and a ditch cannot be appurtenant to another ditch. 1 Bouv. L. D. 113; 2 Washb. Real Prop. 626; *Harris* v. *Elliott*, 10 Pet. 53.

The cases of *Tabor* v. *Bradley*, 18 N. Y. 112, and *Grant* v. *Chase*, 17 Mass. 445, cited by appellant, are authorities for respondent. The question of estoppel cuts no figure in this case, nor does the alleged possession of appellants.

If the evidence had been admitted, could the verdict of

the jury, or decision of the court, have been different? If not, this court will not reverse the case. *Carpenter* v. *Norris*, 20 Cal. 437; *Merle* v. *Matthews*, 26 id. 455.

The evidence showed that the "Park" ditch conveyed water across the main divide of the Rocky Mountains and emptied it into Silver Bow creek, and that the water from it could be used in other ditches beside the Silver Bow ditches; and that there were two ditches, the "upper" ditch and "lower" ditch, that took water from Silver Bow creek. Could the court have found on this evidence that the "Park" ditch was a tributary to, or part of, or appurtenant to the other ditches, or that it could be properly included in the property described in the deed? Appellants attempt to make the deed include a different and additional ditch to the ones they bought. They must rest in this case upon the language of the deed.

If the Park ditch was intended to be conveyed, appellants should bring an action to reform the deed.

SHARP & NAPTON, for appellants, in reply.

Appellants claim the Park ditch by virtue of ownership, whether it is a tributary, an appurtenance, or part and parcel of the granted premises. The complaint alleges ownership, right of possession, and describes the property.

A ditch with water can be appurtenant to land, on the same principle that a reservoir can be an appurtenance to land. The granting words of the deed carry the feeder or tributary, which need not be mentioned. *Thayer* v. *Payne*, 2 Cush. 328.

In *Tabor* v. *Bradley*, 18 N. Y. 112, the court held as respondent states, because no such evidence was offered as appellants offered in this case.

A deed is construed most strongly against the grantor. The evidence that was excluded showed that the Park ditch was a feeder of the other ditches and had been so used for five years prior to the sale. The grantor should have expressly excepted the Park ditch in the deed, if he did not intend to convey it.

WADE, C. J. This cause comes into this court on appeal from a judgment for defendants in the court below. The action is trespass, and the complaint alleges that the plaintiffs are the owners of and are entitled to the possession of certain water ditches, known as the Silver Bow Company's ditches, and more particularly known as the ditches formerly owned by Humphreys and Allison jointly, which ditches convey the natural waters of Silver Bow creek, and the waters emptied into said creek by what is known as the Park tributary of said ditches, to Butte City and the placer mines in that vicinity, also all the water rights, tributaries, flumes, reservoirs, rights, privileges and appurtenances thereto belonging; that on the 12th day of May, 1871, the defendant wrongfully and unlawfully cut and broke the Park tributary of said ditches, diverted the water therefrom and thereby deprived the plaintiffs of their right to the use and enjoyment thereof.

The defendant in his answer admits that the plaintiffs are the owners of, and are entitled to the possession, free use and occupation of the ditches, known as the Silver Bow Ditch Company's ditches, said ditches conveying water from Silver Bow creek to Butte City and the placer mines in that vicinity, and more particularly known as the Humphreys and Allison ditches, together with all the water rights, flumes, reservoirs, rights, privileges and appurtenances thereto belonging, but denies that the plaintiffs, or either of them, are or at any time have been the owners of or entitled to the possession, use, occupation or enjoyment of the Park ditch or the waters flowing through the same, or any right or privilege connected therewith, and denies that the defendant on the 12th day of May, 1871, or at any other time, unlawfully or wrongfully broke the said Park ditch, or diverted any waters therefrom, to which the plaintiffs are or were entitled. The record shows that on the 23d day of June, 1870, the defendant, his wife, and G. O. Humphreys joined in a conveyance and by their deed of that date conveyed to the plaintiffs the following described property, situate in the county of Deer Lodge, Territory of

Montana, to wit: "The ditches known as the Silver Bow Ditch Company's ditches; said ditches carrying water from Silver Bow creek to Butte City and the placer mines in that vicinity, and more particularly known as the Humphreys and Allison ditches. The said R. W. Donnell & Co. to have and to hold each and all of the above-described property, together with all the water rights, flumes, reservoirs, rights, privileges and appurtenances thereto belonging or in any wise appertaining."

Upon the trial, testimony was offered, tending to explain, as it was claimed, the subject-matter of this conveyance, and to show that the Park ditch was known as one of the Humphreys and Allison ditches, and to show the relation the Park ditch sustained to said ditches. Objection was made to the introduction of this testimony, and the objection was sustained. This action of the court is assigned as error.

By this testimony, it was sought to prove that the ditches known as the Silver Bow Ditch Company's ditches, and more particularly known as the Humphreys and Allison ditches, were made up of, and included what was known as the "lower ditch," the "Park ditch," and the "upper ditch;" that the lower ditch was built first, then the Park ditch, and afterward the upper ditch; that the upper and lower ditches carry water from Silver Bow creek and its tributaries to the placer mines, in the vicinity of Butte City; that the Park ditch carries water from a branch of the Bolder to Silver Bow creek; that it was built to supply the upper and lower ditches with water; that water from the Park ditch was used through the lower ditch, until the building of the upper ditch, which was in contemplation at the time the Park ditch was built; that the waters from the Park ditch have always flowed through the upper and lower ditch, and been used on the placer mines of Butte City; that the Park ditch is a feeder of the upper and lower ditches, and that the three ditches are known and reputed as the Humphreys and Allison, or the Silver Bow Ditch Company's ditches; that the plaintiffs took possession of the Park ditch, as well as of

the upper and lower ditches, at the date of the deed; that at the time the Park ditch was constructed, its waters could not be used for mining, excepting through the upper and lower ditches, but at the date of the deed it could have been used through other ditches, but never had been used up to that time, except through the upper and lower ditches.

Was the rejection of this testimony error?

It will be observed that this evidence shows that the three ditches in question were generally reputed and known as the Silver Bow Ditch Company's ditches, and were more particularly known as the Humphreys and Allison ditches; that the Park ditch was built to supply the other ditches with water; that the waters of Park ditch, up to the date of the deed, had always been conveyed through the upper and lower ditches, and used for mining purposes in the vicinity of Butte City, and at the time said Park ditch was constructed, its waters could not have been used for mining purposes in any other manner.

1. In the light of this testimony, supposing it had been received in evidence, can it be said that the Park ditch is an appurtenance of the upper and lower ditches, and that a grant of those ditches would carry with it the Park ditch?

It is undoubtedly true that whatever is properly appurtenant to the principal thing granted passes with it, and, in order to show the existence and the nature and extent of such appurtenances, extrinsic evidence would be competent, as, if A should grant to B his farm, with all the privileges and appurtenances thereto belonging, and attached to his farm was an appurtenant easement in the form of a right of way over the lands of C, such grant would carry with it this right of way, and its existence and extent could be shown by parol evidence. It then becomes important to know what an appurtenance is, and to ascertain what things can and do attach to the principal thing granted.

A thing appendant or appurtenant is defined to be "a thing used and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with

the thing whereunto it is appendant or appurtenant" It signifies some thing appertaining to another as principal, and which passes as an incident to the principal thing.

A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal; so that land cannot be appurtenant to land. *Leonard* v. *White*, 6 Mass. 8; *Harris* v. *Elliott*, 10 Pet. 53; Co. Litt. 121; *Jackson* v. *Hathaway*, 15 Johns. 447.

It follows that things, in their nature equal, and of like character and grade, can never be appurtenant to each other, for the common as well as the legal meaning of the word implies inferiority and dependence, so that a water ditch could never become appurtenant to another ditch of like character, and pass as an incident thereto, for the same reason that one farm will not pass as an appurtenance to another.

This testimony shows that the park ditch is of the same character of property, and is equal to the upper or lower ditch, and therefore it is that it cannot pass under this grant as an appurtenance to those ditches. With equally as good reason it might be said that the upper or lower ditches would pass as an appurtenance to the Park ditch.

2. Is the language of the deed such that the court ought to have received extrinsic evidence in aid of its construction, and could such evidence have been introduced to show that the Park ditch passed by the deed as a part of the *subject-matter* of the conveyance?

It has long been settled, and requires no citation of authorities to assert as established law, that when parties have deliberately put their contracts in writing in such terms as import a legal obligation, without uncertainty or ambiguity as to the object, nature and extent of their agreements, it is conclusively presumed that the whole of the contract was reduced to writing; and all oral testimony as to what was said before, at the time of, or after it was completed, is rejected, because it would tend to substitute an oral for a written contract. In other words, parol contemporaneous evidence is inadmissible to contradict or vary

the terms of a valid written instrument. 1 Greenl. on Ev., § 275; 2 Phil. on Ev., § 350; 2 Stark. on Ev., § 544.

And so the *intent* of the parties must be gathered from what is written rather than from parol evidence, but the language of the instrument may be construed by the light of surrounding circumstances, and, so far as possible, the court may put itself in the place of the parties, and may interpret the *language* from this standpoint, but nothing can be *added to* or *taken from* the *written words*.

So extrinsic parol evidence is always admissible to give effect to a written instrument, by applying it to its proper subject-matter, by proving the circumstances under which it was made, thereby enabling the court to put themselves in the place of the parties with all the information possessed by them, the better to understand the terms employed in the contract, and to arrive at the intention of the parties. *Heldebrand* v. *Fogle*, 20 Ohio, 147; 1 Greenl. on Ev., § 277.

Instruments are to be interpreted according to their subject-matter, and parol evidence may be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Whatever indicates the nature of the subject, is a just medium of interpretation of the language of the parties, and is also a just foundation for giving the instrument an interpretation when considered relatively, different from that which it would receive if considered in the abstract. 1 Greenl. on Ev., § 286.

It is necessary to the validity of a grant that the thing granted should be capable of being distinguished from all other things of the kind, but it is not necessary that the description should be such as to identify the object without the aid of extraneous testimony. And when the description alludes to facts beyond the deed, parol evidence may be offered, not to contradict the description, but to locate the deed upon the land. *McChesney* v. *Wainwright*, 5 Ohio, 452; *Eggleston* v. *Bradford*, 10 id. 312; *Barton* v. *Morris*, 15 id. 408.

In the case at bar, there is a disagreement between the

parties as to the application of the deed to its proper subject-matter, the plaintiff claiming, under the words of the grant, that it includes the Park ditch, and the defendants denying this proposition.

The deed purports to convey to plaintiffs the ditches known as the Silver Bow Ditch Company's ditches, conveying water from Silver Bow creek to the placer mines at Butte City, and more particularly known as the Humphreys and Allison ditches.

Looking at this language alone, was it possible for the court to say how many ditches were known as the Humphreys and Allison ditches, or that the Park ditch was not known as one of those described in the deed, or that the Park ditch did not carry water to the mines of Butte City, or that the Park ditch was not necessary in order to enable the other ditches to carry water there?

If the Park ditch was one of a system of ditches by which water was conveyed from Silver Bow creek to the mines of Butte City, and if this ditch was necessary to the successful working of this system, and was built in connection with other ditches to accomplish this purpose, and if this fabric of ditches was known as the Humphreys and Allison ditches, or as the Silver Bow Ditch Company's ditches, and each of those ditches were necessary to the usefulness of the others, and the destruction of one would have rendered the whole of no value, then in the construction and interpretation of the words of the grant these facts should have been shown to the court. Those things are certain that can be made certain, and it seems to us that the language of the deed, which is uncertain in itself, can be made certain by the aid of extrinsic evidence.

What ditches are known as the Humphreys and Allison ditches? Was and is the Park ditch one of those so known and designated? What relation does the Park ditch sustain to the other ditches? Did the Park ditch supply the other ditches with water, and were the others rendered valuable thereby, and would they be worthless unless fed and supplied by the Park ditch?

In order to work out an intelligent and just construction and interpretation of the words of the grant, all these questions should have been answered. The court will not so interpret a deed as to compel a party to pay a large sum of money for property that is worthless, when, by arriving at the true meaning of the parties by the aid of surrounding circumstances, such an interpretation might be given by applying the deed to its proper subject-matter, as would make the property equal to the sum paid. If the upper and lower ditches were valueless without the Park ditch, and all three were known as the Humphreys and Allison ditches, then we must suppose that the party paying more than $6,000 for the Humphreys and Allison ditches, and the party receiving that sum in consideration of the conveyance, intended to convey the three ditches in question, for the value of each would so depend upon the other as to make the three one property, one subject-matter. But we only intend to speak of the competency of proving these extrinsic facts in aid of the construction to be given to the deed, and it would seem that the language of the deed is such that the court could better construe and interpret its meaning by putting itself in the place of the parties, and judging of the language used by the light of surrounding circumstances.

It is claimed that, by the terms of the conveyance, the ditches granted must carry water from Silver Bow creek to Butte City, and that the grant is limited by these words to the upper and lower ditches, and that the Park ditch is thereby excluded. But if the ditches so carrying water are supplied by the Park ditch, and this ditch is absolutely necessary to produce this supply, not that this ditch simply contributes to the supply, but that it furnishes the whole of the supply, and the ditches conveyed are thereby made valuable, and would be rendered worthless, if this feeder was cut off, then it certainly would become important that the court, in giving a construction to the deed, should know these facts, and thereby arrive at the intention of the parties. By the terms of the grant the ditches conveyed must carry

water. This is the object and purpose, and if the Park ditch is absolutely *necessary* to that end, then it is covered by the conveyance. Whoever grants a thing, is supposed also to grant that without which the grant itself would be of no effect. 2 Washb. on Real Prop. 622; Broom's Max. 362.

And in order to show that the grant would be of no effect unless it carries the particular thing, parol evidence is admissible showing this extrinsic circumstance to enable the court to correctly interpret the language and thereby arrive at the true intention of the parties.

The Park ditch carries water from a branch of the Bolder to Silver Bow creek.

It was built for a purpose. It was not constructed simply to increase the waters of the creek without some ulterior design, but it was built, in connection with the upper and lower ditches, as a part of a system of works by which water can be carried from Silver Bow creek to the mines of Butte City. Water for these mines was the purpose, and the Park ditch was *necessary* to that purpose, and at the time it was built the waters thereof could only be used for this object. Its building was labor lost except it be used with the other ditches. It formed part of the works known as the Humphreys and Allison ditches.

The plaintiffs offered to prove all these facts to aid the court in construing the language of the deed, and we believe this evidence would have materially aided the court in arriving at a just interpretation thereof.

Suppose the Park ditch supplied *all* the waters of the upper and lower ditches, and but for this supply these ditches would remain dry from one end of the year to the other, could it be contended that, under the language of this grant, the plaintiffs intended to pay $6,000, and the defendant intended to receive that sum for *dry* ditches, with no supply of water and utterly worthless? We think not. But, without the aid of extrinsic evidence, a construction might be given to the words of the grant that would work out this result. And here we say again, that he who grants a thing is supposed to, and does grant that without which

the grant is worthless, and he who grants a ditch is supposed to grant not only the excavated channel, but also his rights to the water by which it is supplied and made valuable. And if this supply comes from a second ditch, the conveyance of the ditch thus supplied, by general words, would carry the second ditch as part and parcel of the first.

3. Does the excluded testimony tend to show that the park ditch passed as a *part* and *parcel* of the *subject-matter* of the conveyance, and was it competent for that purpose?

It is important to observe the distinction between what passes as an *appurtenance* and what as *part* and *parcel* of the subject-matter. Things equal to their principal cannot pass as appurtenant to it. Things corporeal cannot pass as appurtenant to things corporeal, a ditch to a ditch, nor land to land. But it frequently happens that land passes as *parcel* of the subject-matter, although not particularly mentioned or described in the deed. In order that it may thus pass, it must be *necessary* to the enjoyment of that which is granted, and must be *intended* to pass with it, and must be *used*, *reputed* and *known* as part and parcel of the principal thing.

The conveyance of a manor, a messuage, or farm, known by a certain name, and including distinct tenements, buildings or fields, which have been *used* with the principal thing and reputed parcel of it, would pass under the general name of the manor, messuage or farm. *Grant* v. *Chase*. 17 Mass. 446; *Taber* v. *Bradley*, 18 N. Y. 112.

By the grant of a messuage, or house, the garden and curtilage pass. Co. Litt. 5. If a man grant a boilery of salt, the land passes. Co. Litt. 4.

In the case of *Archer* v. *Bennett*. 1 Lev. 131, it was found by special verdict that A being seized of a mill and kiln, at the end of the close wherein the mill stood, granted the mill, and the question was whether the kiln passed, and it was held that it would have passed, if it had been found that the kiln had been *necessary* to the mill.

So the grant of a mill carries with it the use of the water by which it is worked, the flood gates, dam, and all things necessary for its use, as well as the soil and freehold of the land on which it stands and over which it projects, and such grant may embrace land adjoining it which is *necessary* for its use, and is actually used with the mill. The adjacent land, in such cases, passes as *parcel* of the principal thing granted. 2 Washb. on Real Prop. 623; *Blake* v. *Clark*, 6 Me. 436; *Forbush* v. *Lombard*, 13 Metc. 109; Shepp. Touchst. 89.

So, it seems that lands under certain circumstances pass as parcels of the subject-matter, when not named or described in the deed. And if the grant of a mill carries with it the water by which it is worked, the dam, flood-gates, races, as well as the soil upon which it stands, and adjacent lands for lumber yards, etc., and if the grant of a farm, known by a particular name, carries with it buildings and fields, which have been used with the principal thing, and if the grant of a house carries with it the land upon which it stands, together with the curtilage and garden, before these things can pass as part of the principal thing, or as parcel of the subject-matter, it becomes necessary that extrinsic evidence should point out the relation the parcel sustains to the subject-matter. Without the aid of such evidence, the words of the grant must govern, and, thereby, the object of the conveyance be defeated. Extrinsic evidence must point out the parcel, show its relation to the principal thing, and show it necessary to the enjoyment of the thing granted. We must inquire what has been *used* with the principal thing, and what has been *reputed* and known as parcel of it, and for this purpose and for the purpose of learning the extent of the grant, and to apply the deed to its proper subject-matter, extrinsic evidence is competent.

The Park ditch may be a parcel of the Humphreys and Allison ditches, or it may not. That depends upon the relation it sustains to those ditches. If it stands in the same relation to the upper and lower ditches, as a mill-race does to a mill, that is, if it is necessary to the use and enjoyment

of those ditches, and they would be worthless without it, and if it was generally reputed and known as one of the Humphreys and Allison ditches, the nit is covered by the words of the grant, and passes by the deed.

The reason why things pass as parcel of the principal thing, although not named in the deed, is because they are *necessary* to the *use* and *enjoyment* of the thing granted, and because parties may be supposed to intend to make these grants beneficial and useful. Extrinsic evidence is competent to apply the description in the deed to its proper subject-matter, and to show the extent of the grant, by showing what is necessary to the enjoyment thereof, as by showing that a separate field belongs with the farm, or that a water-right belongs to a mill, and so for the same reason and for the same purpose, it may be shown that the Park ditch is one of the Humphreys and Allison ditches, and that without the Park ditch, the granted ditches would be of no value.

We, therefore, think the evidence offered, showing the relation of the Park ditch to the upper and lower ditches, and showing that the three ditches were known as the Humphreys and Allison ditches, was competent evidence to aid the court in giving the proper construction to the language of the deed.

With all the testimony before it, the court may arrive at the same conclusion as without it, but with this we have nothing to do, and we only speak of the right to introduce evidence in aid of the interpretation of the language used, and we have no doubt of the materiality of the testimony offered for this purpose.

Judgment reversed.

MURPHY, J., concurred.

KNOWLES, J., dissenting. I fully concur in that portion of the opinion of the court in this case upon the point that the Park ditch cannot be considered as an appurtenance to the Humphreys and Allison ditches, carrying water from Silver Bow creek to Butte City and the placer mines in that vicinity. But I entirely dissent from that portion of that

opinion that holds that, by any construction of the deed from the Humphreys to R. W. Donnell & Co., the Park ditch can be embraced therein and treated as part of the subject-matter of that conveyance. The description of the property conveyed by that deed is set forth in the following language: "The ditches known as the Silver Bow Company's ditches, said ditches conveying water from Silver Bow creek to Butte City, and the placer mines in that vicinity, and more particularly known as the Humphreys and Allison ditches."

The Park ditch, as appears by the record, conveys water from the eastern side of the main ridge of the Rocky Mountains to the western side, and usually discharged its waters into Silver Bow creek, some distance above the head of the Humphreys and Allison ditches, carrying water to Butte City.

The Park ditch, it appears, was also known by that name, although it was classed as one of the Humphreys and Allison ditches, or as one of the Silver Bow Company's ditches, Humphreys and Allison being the persons who composed that company.

The words of general description in the deed referred to, were "The Silver Bow Company's Ditches" and the "Humphreys and Allison Ditches."

These general words of description, however, I hold, were limited by those of the particular description, and these were "carrying water from Silver Bow creek to Butte City, and the placer mines in that vicinity." The particular description in a deed always controls and limits the words of general description.

Now, if testimony can so aid a court that, in the construction of that deed, it can make the Park ditch, carrying water from Boulder creek, on the east side of the Rocky Mountains, to Silver Bow creek, on the western side of the Rocky Mountains, and longer than either of the other ditches, one of the Silver Bow Company's ditches, carrying water from Silver Bow creek, which is entirely on the west side of the Rocky Mountains, to Butte City, and the placer mines in that vicinity, then a court, aided by testimony, can do more than any other human power.

The considerations that seem to impel my brother judges to hold that testimony might produce this miraculous effect, is, that possibly without the Park ditch the other two ditches might be valueless; and, therefore, it could not be presumed that the plaintiffs would have purchased these two ditches without the Park ditch, and paid $6,000 therefor. If the consideration of whether a piece of property, particularly described in a deed, would be valueless, without it was joined with another piece of property not described in the deed, are to so influence a court, in construing the deed, as to place the other piece of property within its terms as part of the subject-matter, then I see no reason why the rule may not be carried a little farther; and if another piece of property would render the piece described in a deed more valuable than it would without it, then it should be considered as embraced within the terms of the deed, and conveyed with the other as part of the subject-matter.

If A conveys to B a lot of ground, and it is found that another lot adjoining it will render it valuable, or more valuable, then the second lot would be construed as embraced within the terms of the deed as part of the subject-matter thereof. The bare statement of such a rule shows its fallacy. I am sure that in all the cases where property has been held to be conveyed as part of the subject-matter, it has been embraced within the description of the deed. When a water-mill has been conveyed, the mill-dam and race have always been treated as a part of the mill and embraced within the general description of such property, and nothing was contained in the deed which exhibited the fact that it was excluded. Here, however, this is not the case. The conveyance was limited to the Humphreys and Allison ditches, carrying water from Silver Bow creek to Butte City and the placer mines in that vicinity, and the Park ditch does not carry water from Silver Bow creek, or to Butte City, and the placer mines in that vicinity.

For these reasons I dissent from the views of my brother judges.

WOOLMAN et al., respondents, *v.* GARRINGER et al., appellants.

CASE AFFIRMED — *legal and equitable relief in the same action.* The case of *Gallagher* v. *Basey*, *ante*, 457, affirmed. Legal and equitable relief cannot be obtained in the same proceeding, and a judgment for damages for the diversion of water, and which perpetually enjoins parties from using the water, is irregular and void.

WATER — *change of place of use and purpose.* The prior appropriator of water for mining purposes at a certain point can extend his ditch and use the water, to the extent of his appropriation, at any other point for the same or a different purpose.

WATER — *date of appropriation — diligence.* The appropriation of water by parties, who prosecute the work on their ditch with reasonable diligence, dates back to the commencement of the work.

WATER — *notice of change of use by appropriator.* The prior appropriator of water, who posts notices of his appropriation near the stream and immediately constructs his dams and ditches, is not required to give any actual notice to subsequent appropriators of his intention to extend his ditches, and reclaim the waste-water from his mining operations, and use the water at another place.

WATER — *subsequent appropriator — abandonment.* The subsequent appropriator of water, who acquires the privilege of using the waste-water of the prior appropriator, can be deprived of the same at any time, unless the water has been returned into the original channel without any intention of recapture.

Appeal from the Third District, Lewis and Clarke County.

THE decree was entered in this action in March, 1871, by WARREN, J. At the trial, Garringer excepted to the following instructions, which were given by the court:

"The plaintiffs are not required to take notice of the intention of the defendants to carry or convey the waters of the said gulch beyond the point specified in the notice, unless such intention was indicated by such acts as would convey to a reasonable person notice of such intention, or actual notice given to them, prior to acquiring any intermediate rights.

"The record notices introduced of defendants' claims to the water in controversy are not notice to plaintiffs by reason of being recorded, and it devolves on defendants to show actual notice of such record, or actual execution of

the work described in it, prior to any intermediate rights plaintiffs, or their predecessors, may have acquired to the water in controversy in order to affect the plaintiffs with such notice.

If the jury believe, from the evidence, that plaintiffs, or their predecessors in interest, were not notified of the defendants' intention to carry the water in controversy out of the natural channel of the stream to some point designated, and that the defendants had done no act sufficient to indicate to a reasonable person such intention, and that the plaintiffs, or their predecessors in interest, took up said water after it was returned to McClellan gulch, and carried and conveyed the same in and upon their ranches for some useful purpose, then said defendants have no right thereafter to so change or divert said water as to deprive the plaintiffs of the use thereof.

If the jury do not believe, from the evidence, that the defendants did such acts as would convey to a reasonable person a notice of their intention to convey the waters of McClellan gulch to such point as would not reach plaintiff's' ditch, then it devolves upon said defendants to show an actual notice to said plaintiffs of their intention so to carry the same, prior to plaintiffs' appropriation.

If the jury believe, from the evidence, that the defendants conveyed the water in controversy to what is known as Union Bar or McClellan gulch, and permitted the same to flow back into said gulch without giving the plaintiffs, or their predecessors in interest, any notice of their intention to carry it elsewhere, and that their acts and works did not indicate to a reasonable person an intention to carry it elsewhere, and that said plaintiffs, or their predecessors in interest, before such notice or acts, appropriated and took possession of the waters so returned to said McClellan gulch, then defendants have no right thereafter to divert said waters from plaintiffs.

If a person appropriates water to be used at a particular point, and there uses it, and then permits it to flow back into its natural channel and go on down its accustomed

course, persons below may appropriate the same so as to make it a vested right, and no subsequent change of the prior appropriation can be made so as to deprive such appropriators of the use of such water.

If the jury believe, from the evidence, that the defendants had no ditch, or survey for a ditch to the stream of water in dispute, and also that they had no notice or marks upon said stream indicating an intention to appropriate it and carry it to a point where it would not flow back into the natural channel of said stream above the point of plaintiff's appropriation, at the time plaintiffs' predecessors in interest made the appropriation of said water, then you will find for the plaintiffs in the number of inches they are entitled to, and such damages as they have proven they have sustained, not exceeding the sum of $5,000."

The other facts appear in the opinion.

W. F. SANDERS, W. E. CULLEN and G. G. SYMES, for appellants.

The prior appropriator and owner of a ditch has the exclusive control and right of enjoyment of the water diverted therein; and he may change the place of use at pleasure without forfeiting the right. *Maeris* v. *Bicknell*, 7 Cal. 261; He can change the use of same. *Davis* v. *Gale*, 32 Cal. 26.

Appropriation and use and nonuse are the tests of right, and place and character are not. After appropriation a party is entitled to use the amount appropriated at any place where he may convey it for a useful purpose. *Davis* v. *Gale*, 32 Cal. 34; *Weaver* v. *Eureka L. Co.*, 15 id. 273; *Kidd* v. *Laird*, id. 161.

A party cannot acquire rights to waste water as against the first user. He may make use of the water, but the first appropriator can assume possession of same at any time. *Doughty* v. *Creary*, 30 Cal. 290.

Survey of ground, planting stakes, giving notice and continually working on the ditch are possession, and when the ditch is completed the appropriation relates back to the date of commencement. *Conger* v. *Weaver*, 6 Cal. 548; *Kimball* v. *Gearheart*, 12 id. 27.

Appellants put up notice claiming one thousand inches of water for mining purposes and recorded it with county recorder, and worked on their ditch until completion. Where did respondents acquire any right to use any portion of the one thousand inches?

The court erred in its instructions, which were to the effect that when water is appropriated for mining purposes and used at one place, it cannot be conveyed to another place if some person has been using the waste water from the mining operations. The authorities already cited show that this was error.

The court also erred in its instruction, requiring the prior appropriator to give notice to the party using waste water that he could not always use it.

The proceedings in this case are irregular. The complaint consolidates actions at law and in equity, and asks for damages and an injunction. The judgment is for damages and a perpetual injunction, and is founded on the verdict of a jury. *Kleinschmidt* v. *Dunphy*, 11 Wall. (U. S.) 610; *Orchard* v. *Hudges*, 1 Wall. (U. S.) 76; *Benner* v. *Porter*, 9 How. 242: *Noonan* v. *Lee*, 2 Black, 499. This suit was commenced on the common-law side of the court for damages, and there was no jurisdiction to grant equitable relief. The action was tried by a jury and an injunction was granted in effect by the jury. The case should be reversed for these irregularities. *Lyon* v. *Woodman*, 3d Dist. Utah; *Ferm* v. *Holme*, 21 How. (U. S.) 481.

SHOBER & LOWRY and E. W. TOOLE, for respondents.

The case was tried as requested by all parties. Instructions were given by the court at the instance of appellants as well as respondents. No objection was taken by appellants to the manner and form of the action, or the manner and form of the trial. The case was tried as authorized by the Practice Act.

The only questions presented by the record are these: Do the general verdict and special findings sustain the judgment? Did the court err in giving or refusing instructions

to the jury? The judgment is correct. The instructions cover every material proposition.

The extent of the rights acquired by respondent, to which subsequently acquired rights must be subordinate, was one of fact for the jury. *Nevada W. Co.* v. *Powell*, 34 Cal. 109.

When a right has vested in the subsequent appropriator, the prior appropriator cannot extend his claim, or change the means of his appropriation to the prejudice of the second appropriator. Ang. on Water-courses, 237; *Butte C. & D. Co.* v. *Vaughn*, 11 Cal. 153; *Kidd* v. *Laird*, 15 id. 161; *Kimball* v. *Gearheart*, 12 id. 27; *Butte T. M. Co.* v. *Morgan*, 19 id. 616; *Hill* v. *Smith*, 27 id. 476; *McDonald* v. *Askew*, 29 id. 290; *Nevada W. Co.* v. *Powell*, 34 id. 109.

Appellants cannot raise the question of the improper blending of actions in this court for the first time. The legal rights were determined by the jury. The decree and injunction emanate from the court. *Toombs* v. *Hornbuckle*, *ante*, p. 286.

MURPHY, J. This is an appeal from the judgment-roll, in an action for damages, for the diversion of water, and for an injunction, united in the same complaint, tried to a jury, and judgment for damages and a perpetual injunction.

The jury returned a general verdict for $250 damages, in favor of the plaintiff, and, also, findings on the special issues submitted.

Thereupon, both parties filed motions—the plaintiffs for judgment and decree, and the defendants to set aside the general verdict, and for judgment upon the special findings.

Both motions were heard together, and the defendants' overruled, and the plaintiffs' sustained, and, accordingly, judgment based upon the general verdict for $250 damages rendered, and a decree, based upon the pleadings, general verdict and special findings, for perpetual injunction entered, in favor of the plaintiffs and against the defendants.

To this action of the court, as also to the ruling out of certain testimony, and the refusal and giving certain instruction to the jury, defendants, by counsel, excepted and appealed to this court.

The first inquiry that naturally and properly arises here is, as to the regularity and legality of the proceedings in the court below, and involves the question of jurisdiction.

The proposition, that law and equity cannot be blended in the same suit or action, under our organic act, was elaborately discussed and definitely settled in the case of *Gallagher et al.* v. *Basey et al.*, by this court, at its January term, 1872.

Upon the strength of that decision and the authorities upon which it is based, and the general principles of law governing, we hold:

1. That the organic act, in clothing the supreme and district courts of the Territory with both common-law and chancery jurisdiction, confers them as separate powers and distinct jurisdictions.

2. That in judicial proceedings in pursuance thereof, the well-known and recognized distinctions between law and equity must be maintained, and the peculiar and characteristic features of these different jurisdictions preserved, and they exercised separately and not together.

3. That it is within the province of the local statute to regulate or limit and control the forms of proceedings, in actions at law and suits in equity, but not within the scope of its authority to destroy or blend together, in the same proceeding, the two jurisdictions.

4. That actions at law, where legal remedy is demanded, must be tried as at law, and the judgment based upon the verdict of a jury, or the findings of the court sitting in the capacity of a jury.

5. That suits in equity, where equitable relief is prayed, or where an equitable defense is set up to a claim at law must be tried as in a court of chancery, and the decree emanate from the judge sitting as a chancellor.

In the case at bar both legal and equitable relief is sought, and both the law and chancery powers of the court are invoked.

In the same complaint both damages at law and an injunction enjoining in equity are asked.

While it purports to be an action brought on the law side of the court for damages, yet it seeks relief by restraint on the equity or chancery side also.

And in this condition it was tried to a jury as at law, and a judgment rendered upon the general verdict of a jury, for $250 damages for the plaintiffs, and, at the same time and in the same connection, a decree entered perpetually enjoining and restraining the defendants.

The court could only consistently and lawfully exercise but one of these separate functions or distinct jurisdictions in the same proceeding, and that only when properly invoked.

The proceedings are neither in conformity to the established principles and rules governing in law or in equity, but seem to partake of the nature of both, and are irregular and illegal throughout.

And for these reasons, if there were no others, the case will have to be reversed.

And here the matter might rest were it not for the fact that another and very important question presents itself, which it is considered advisable to notice in this connection.

It relates to the effect on the right of the appropriator of water of a change in the *place* of *use* of the water appropriated.

From the record it appears that on the 4th of June, 1866, the defendants and their predecessors in interest, by means of a dam, ditch and a posted notice at the point of appropriation, and about four miles above the mouth of the creek, did appropriate one thousand inches of the water of McClelland creek, in Jefferson county, Montana Territory, for mining purposes.

And it also appears, that afterward, in September of the same year, plaintiffs, by means of a dam and ditch, about a mile below the point of defendants' appropriation, did likewise appropriate two hundred inches of the water of said creek.

And it further appears that defendants, by means of their said ditch, from the 30th day of June to the 4th day of July, 1870, did divert the water of the creek aforesaid from the head of and away from the plaintiffs' ditch.

And of these facts there is no controversy, and upon the appropriations, as above stated, the parties base their respective claims.

The record also shows that "there was no proof introduced tending to show," "nor" that "it was claimed on the trial that either right of either party had been abandoned." And further, that "it was proven and conceded that the defendants' appropriation of the water was prior, in point of time, to the plaintiffs', to the extent of one thousand inches; but the plaintiffs claimed that, as they, the defendants and grantors, had not carried the water away, or given notice of their intent to carry it away from the head of plaintiffs' ditch, until after plaintiffs' grantors' appropriation, that, therefore, they could not thereafter do so."

And this is the proposition upon which the plaintiffs rested their case, and which we propose to briefly consider for the purpose, if possible, of settling the law in that regard so far as this Territory is concerned.

The case seems to have been tried and determined upon the theory that the water was not carried away from the point where the plaintiffs' ditch tapped the stream, or that there was no actual *notice* brought home to plaintiffs of such intention to carry it away before their subsequent appropriation.

The facts are, water was not carried away till after the dam and ditch of plaintiffs were constructed, nor does it appear that any notice, other than that of the general appropriation for mining purposes, was even given, except it be such as the acts of the defendants themselves might have indicated to the mind of a reasonable person. And it is not claimed that they did not follow up the construction of their ditch with proper diligence.

We are constrained to believe that all this was not necessary, and that the defendants had the right, under the cir-

cumstances, to change the place of use and divert the water to any other point, to the extent of their appropriation.

In the case of *Maeris* v. *Bicknell*, 7 Cal. 261, the court said: "The next question which arises in this case is, whether a party who makes a prior appropriation of water can change the *place* of its use without losing that priority, as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that the mere change in the *use* of water from one mining *locality* to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the right of the party. It would destroy the utility of such works were any other rule adopted."

And in the case of *Davis* v. *Gale*, 32 Cal. 26, this rule is not only confirmed, but the court goes still further and lays down another equally wise and important rule, that a prior appropriator may even change the *use* for which he first appropriated the water without losing his right of priority, as against a party whose subsequent appropriation was made before the change took place.

In the language of the learned judge who delivered the opinion of the court in that case, "a party acquires a right to a *given quantity* of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use and nonuse are the tests of his right, and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the *quantity* which he has appropriated at *any place* where he may choose to convey it, and for *any useful* and *beneficial purpose* to which he may choose to apply it. Any other rule would lead to endless complications and most materially impair the value of water rights and privileges.

"Thus, a party may appropriate water, in the first instance, for the purpose of placer mining, and when his ground is worked out, or he finds it will not pay, or that ground further on is better, he may leave the former and carry the water to the latter without losing his priority.

"Or he may find paying quartz, and change the use of his water from fluming or sluicing into a motive power for crushing his quartz, without forfeiting his prior right.

"And so he may in the first place tap a stream for the purpose of running a saw-mill, and after the timber is exhausted, or he finds that a grist or any other kind of a mill will be more profitable, he may change the use from one purpose to the other and to a different point, if necessary, without surrendering or impairing his right of priority.

"These water rights are frequently secured by and attended with the expenditure of large sums of money, and to limit them to the *particular place* or the *special purpose* in view of which they were first sought and acquired, by such a harsh and arbitrary rule of law, would be manifestly unjust and seriously deleterious in its results, and greatly embarrass and retard the development of the resources of the country."

We agree with the view expressed in the case of *The Union Water Company* v. *Crary*, 25 Cal. 509, that the right of the first appropriator may be lost in whole or in part by adverse possession, under the statute of limitations. But in this case no adverse possession is contended for nor is the statute of limitations pleaded or relied upon by the plaintiffs.

And from the record it appears that the defendants pursued the work on their ditch, which is some twenty-seven miles long and cost about $50,000, with such reasonable diligence as would undoubtedly make the appropriation date and relate back to the commencement of the same, even were abandonment claimed and insisted upon.

The notices posted on the stream, of the appropriation of so much water for general mining purposes, and the immediate entering upon the continued prosecution of the construction of the dam and ditch, and its extension or branches, were sufficient to put the plaintiffs on their guard and to apprise them of the prior appropriation of the defendants and of their superior rights in the premises. And from these facts they were bound to take and were charged

with notice of the defendants' prior appropriation, and if they then proceeded it was at their own option and peril.

Nor were the defendants required to take notice of any subsequent appropriation by the plaintiffs, nor to give notice that they intended to reclaim the waste water from their mining operations, and that plaintiffs could not always use the same.

The plaintiffs could acquire no other than a mere privilege or right to the use of the waste water, or at most, but a secondary and subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time, unless the water had been turned back into the original channel after it had been used and answered the purposes of the first appropriators, without any intention of recapture, and thereby became *publice juris* and subject to appropriation by any one, which does not appear from the record; but clearly the contrary it shows, and was claimed on the trial and proof offered to that effect.

The case is reversed and remanded.

GRISWOLD, respondent, *v.* BOLEY et al., appellants.

PRACTICE — *statement on motion for new trial — particular errors.* Under section 195 of the Civil Practice Act, the statement on the motion for a new trial must specify the particulars in which the evidence is insufficient, and a specification that "the evidence in this case does not justify the verdict," is too general and uncertain and will not be reviewed by this court.

PRACTICE ON APPEAL — *presumption — new trial — notice — specifications.* In the absence of any objection this court will presume that a notice of the motion for a new trial was given, although it does not appear in the record, and that the specifications of this notice are contained in the motion for a new trial.

PRACTICE — *statement — motion for new trial.* The specifications of error form a part of the statement, but they are separate and distinct from the motion for a new trial.

PRACTICE — *consideration of exceptions.* This court will not consider exceptions that were not taken at the proper time and duly served.

PRACTICE — *exceptions — instructions.* Exceptions to the charge of the court must be made to a specified portion thereof, before the case is finally submitted to the jury.

PRACTICE — *verdict — conflicting evidence — prejudice.* A verdict will not be disturbed that is fairly sustained by any testimony, although the weight of evidence is against it, unless it appears to be the result of passion, prejudice or fraud.

PRACTICE — *exceptions to proof.* Objections to the proof of special damages cannot be made in this court for the first time, if no exceptions were taken to the same at the trial in the court below.

MARRIED WOMEN — *record of separate property.* A married woman, who records with the register of deeds of the county in which she resides, a bill of sale of personal property and also a list of such property and its increase, complies with the statute exempting "the property of married women from execution in certain cases," and thereby notifies the world that the same is her property.

MARRIED WOMEN — *property — husband — creditors.* A married woman, who has duly recorded her property, can make her husband her agent and give him the control and possession of the same without affecting her rights, or rendering the property liable for the debts of her husband.

EVIDENCE — *general reputation of ownership — fraud.* Evidence of general reputation in the neighborhood, concerning the ownership of certain cattle by a married woman, is competent to rebut the allegation that she had conspired to deceive and defraud the creditors of her husband.

PRACTICE — *order of proof.* The court can determine the order in which the proof shall be introduced.

MARRIED WOMEN — *silence about title — estoppel.* A married woman, who has duly recorded her property, is not estopped from asserting her rights thereto, if she was silent when her husband stated that he had the title to the same.

REPLEVIN — *demand.* No demand for a return of property, which has been unlawfully taken, is necessary before the commencement of a suit therefor.

SHERIFF — *parties — liability.* The acts of the sheriff in taking property are the acts of the parties to the suit, and the officer and parties are liable therefor.

Appeal from the First District, Jefferson County.

THIS action was tried in November, 1870, in the district court, SYMES, J., by a jury that found for Griswold. In October 1871, the court, MURPHY, J., overruled the motion for a new trial, and Boley appealed. The facts appear in the opinion.

E. W. TOOLE and J. J. WILLIAMS, for appellants.

No special damages are claimed in the complaint. Boley, as sheriff, levied on the property by virtue of an execution in favor of Hall and Miller. There is no evidence that Hall or Miller participated in or directed the levy or sale

2 Estee's Pl. 208, §§ 74, 79, and cases cited. This fact must be proven. It cannot be inferred that Hall or Miller directed the levy or sale of any property, except that of the execution debtors.

The fact of a demand in the case must be proved on the trial. There is no evidence that any demand was ever made of Boley, Hall or Miller, or that they were joint trespassers, or refused to deliver. Civ. Prac. Act, § 177; *Daumiel* v *Gorham*, 6 Cal. 44; *Killey* v. *Scannell*, 12 id. 75; 2 Estee's Pl. 210, §§ 73, 84. The answer denied every material allegation of the complaint.

Evidence was improperly introduced upon the question of special damages, which were not demanded in the complaint.

Respondent must bring herself within the provisions of the statute exempting her property from execution. Act 1865, 369. She must show that the debt for which the execution issued was not for necessaries, etc. On this point there is no evidence. She must show that the list referred to was on the records of the proper county when the levy was made. The court erred in allowing respondent to state her reasons for not filing her list of property sooner. The reasons could not excuse a strict compliance with the law.

The value of the property, as found by the jury, was excessive, and not supported by any evidence.

At common law, marriage is an absolute gift to the husband of the goods of the wife at the time of marriage. The common law recognizing this doctrine has been adopted in this Territory. The husband is not a party to this action. This action must stand or fall on respondent's title to the property.

The statute requiring the wife's separate property to be on record must be strictly construed. The property, up to the time of filing the list required by the statute, is absolute in the husband. The property in controversy was that of the husband of respondent at the time the debt was contracted by him with appellants. A husband cannot give his wife property to defeat the collection of his debts due

at the time. There is no evidence that respondent ever received the property from her husband. How then did the property become that of respondent?

If the husband has transferred the property to respondent, it is only to the extent of making it exempt from his debts. This does not give respondent possession or dominion over the property, and she cannot maintain an action of replevin therefor. The filing of the list does not operate as a gift or sale to respondent.

The statute exempts only future debts of the husband, and does not include those that exist at the time of filing the list. The property of the husband is subject to his debts incurred before such filing. It is a new right given without a new remedy. If the new right does not confer possession, the wife cannot maintain replevin. The only remedy of the wife is to prevent the sale of the property by injunction.

Respondent's husband was entitled to the possession of the property as against a trespasser, and she brings an action for it. If the action was by the husband, his possessory right was subject to the attachment. If respondent could maintain replevin against a trespasser, the sheriff, Boley, was not a trespasser for levying upon the possessory right of respondent's husband.

SHOBER & LOWRY, W. F. SANDERS and CHUMASERO & CHADWICK, for respondent.

The taking alleged in the complaint is not denied, but admitted. Appellants say the taking was not "wrongful" or "unlawful." *Lay* v. *Neville*, 25 Cal. 549; *Fish* v. *Redington*, 31 id. 185. No proof of Hall and Miller participating in the sheriff's taking was required.

The evidence of special damages was not objected to by appellants at the trial, and no exception was saved thereto, and judgment cannot be reversed therefor.

The record shows that the debt in the case, under which the seizure was made, was a debt of a ditch company, and not for necessaries to respondent.

The errors of law raised by the statement relate to the order of proof, which was within the discretion of the court. Respondent did not attempt to prove ownership by general reputation. Such proof was introduced to meet the allegations of the answer that she had perpetrated a fraud, or been culpably silent. 1 Cal. Dig. 329, § 89. Respondent had caused her ownership to be known by recording the list of property and complying with the statute.

The specifications of error do not point out the particular errors and must be disregarded. Civ. Prac. Act, § 195. No exceptions to the giving or refusing of instructions were taken at the trial.

Appellants set up an equitable estoppel as a defense. This cannot be pleaded or proven against a *femme covert*. *U. S. Bank* v. *Lee*, 13 Pet. 107; *Morrison* v. *Wilson*, 13 Cal. 494. If her actions and words do not constitute an estoppel, her silence is not such estoppel.

The failure to record the lists does not vest the wife's property in her husband, but makes it liable for his debts, as at common law.

A general exception will not be reviewed on appeal. Exceptions to the charge to the jury must point out the specific portions excepted to. *Hicks* v. *Coleman*, 25 Cal. 132; *Newell* v. *Doty*, 34 N. Y. 89; 3 Estee's Pl. 503.

Appellants do not show in the statement wherein the evidence is insufficient to sustain the verdict. *Sanchez* v. *McMahon*, 35 Cal. 218; 3 Estee's Pl. 618.

A judgment will not be set aside as against the weight of evidence, except in extraordinary cases. *Kimball* v. *Gearheart*, 12 Cal. 27; *Treat* v. *Reilly*, 35 id. 129.

When the taking of property is unlawful, no demand is necessary before bringing a suit. *Paige* v. *O'Neal*, 12 Cal. 483.

Appellants cannot now object that there is a misjoinder of parties. They should have demurred in the court below. Civ. Prac. Act, § 45.

WADE, C. J. This is an action to recover possession of seventy-one head of cattle, alleged to be the property of

plaintiff, and wrongfully taken and detained by defendants. It is an ordinary action of claim and delivery of personal property, and by the record it appears, that on the 1st day of July, 1870, the defendant E. M. Boley, as sheriff of Jefferson county, seized the property in question as the property of Cornelius Griswold, by virtue of a writ of attachment duly issued in a suit wherein L. C. Miller and S. M. Hall were plaintiffs, and William Berkins, George Cleveland, Cornelius Griswold and William Munn were defendants; whereupon Sarah M. Griswold, plaintiff, wife of said Cornelius Griswold, claimed the property attached as her sole and separate property, and caused the same to be replevied from the sheriff, and the main question in the trial below was as to the title and the right to the possession of the property in litigation.

The cause comes into the court on appeal from an order overruling a motion for a new trial. Objection is made that the statement on motion for a new trial does not sufficiently, and with sufficient certainty, specify and point out wherein the evidence is insufficient to justify and support the verdict, or wherein the errors of law complained of occur.

The requirements of section 195 of the Code, wherein the mode of proceeding for a new trial is given, seem incapable of being misunderstood or misinterpreted. It is therein provided that the party intending to move for a new trial shall give notice to the adverse party, and that the notice shall designate generally the grounds upon which the motion will be made, and that when the notice designates as the ground upon which the motion will be made the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient, and when the grounds of the motion are errors of law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. The object of these requirements, and the reason why they are imposed upon the party moving for a new trial, is to notify the adverse party and the court of the

exact error complained of, so that the evidence in the statement may be confined to the elucidation, pro and con, of the matter complained of.

This section does not contemplate that all the evidence produced upon the trial shall be contained and reproduced in the statement, but only so much thereof as is applicable to maintain or to defeat the questions raised on appeal.

The motion *must* designate and specify with exactness and precision the grounds upon which the motion will be made, and these specifications *must* be carried into the statement and form a part thereof, and only so much of the evidence shall be reproduced as tends to explain the specifications of error.

The cause on appeal is to be tried upon questions of law and fact, raised in the statement, and a statement that makes a general assignment of errors as to the law and fact, calls upon the appellate court to form itself into a sort of investigating committee to hunt after possible errors, in the hope that the court will find what the appellant has been unable to do, and if the court should take any notice of such general assignment of errors, it would necessarily be compelled to try the case over again upon the facts, like a case in equity, upon the pleadings and proofs. This court has no jurisdiction for any such purpose, and we must confine ourselves to the investigation of such alleged errors as are specifically raised in the statement.

The specification of errors forms the frame work of the statement, and the evidence is only produced to strengthen and support the structure, and make it complete. The specification is not only necessary, in order to direct the attention of the court to the evidence that bears upon the error complained of, but it is equally necessary to enable the adverse party to suggest intelligently such amendments as may be important to the just determination of the case.

It is the duty of the court to settle the statement, so far as the evidence is concerned, if the parties fail to agree, but neither the court nor the adverse party can act intelligently in the premises, until the errors complained of are specifi-

cally designated, for only so much of the evidence should go into the statement as tends to elucidate the point in dispute, whereas, a general assignment of errors would compel a reproduction of all the testimony, and would impose upon the court the duty of trying the case again upon its merits, and this the law does not contemplate.

We say, with Mr. Chief Justice FIELD, in *Barrett* v. *Tewksbury*, 15 Cal. 358, that the specifications must be made when the statements are originally prepared. Nor is there any difficulty in pursuing this course, but, on the contrary, the labor of the parties, as well as their expenses, will be thereby greatly lessened. It is certainly a very simple matter for the party appealing to allege, either at the commencement or conclusion of his statement, that, on appeal, he will rely upon certain errors committed by the court; as for example, in admitting the testimony of a particular witness, or in excluding certain documents, or in giving or refusing certain instructions, or in making particular rulings upon the contract or subjects in controversy. When the grounds are thus specified, it will be an easy matter to state so much of the evidence, as may be necessary to explain and point them out, and the adverse party will be enabled to suggest, readily and intelligently, such amendments to the statement, as he may deem important to their just determination.

There may be cases where equitable relief is sought, in which the general ground of appeal will be, that the decree is not warranted by the evidence; yet, even then, the general ground will be found, in a great majority of instances, subject to more particular specifications, as that the evidence does not establish a contract or show a tender or compliance with particular conditions precedent, or the like, which will constitute the matter urged upon the court.

In the case at bar, there does not seem to have been any notice of motion for a new trial, but as there was no objection raised upon this ground, we must conclude that the notice was given, and that the specifications of such notice were carried into the motion for a new trial, which appears

in the record, and seems to form the specifications of errors in the statement. And, although we believe the specifications of error should form a part of the statement, separate and distinct from the motion for a new trial, we have concluded to examine the grounds for a new trial, as specified in the motion.

The first specification of error is as follows:

"The evidence in the case does not justify the findings of the verdict."

For reasons already suggested, the court will not undertake to ascertain if the evidence justifies the verdict. This would compel the trial of the cause upon its merits. The statement must specify the particulars in which the evidence is alleged to be insufficient. It must point out, with exactness and precision, the weak point in the testimony; otherwise, it will receive no consideration from the court. Any other rule would compel the court to go upon a voyage of discovery through an interminable record, in pursuit of — nothing. We cannot enter upon a speculation so vague and uncertain. One other specification is as follows:

"The court erred in instructing the jury for the plaintiff, as they were instructed by the court at the time."

This specification is of like character to the one already considered, and for like reasons cannot claim the attention of the court. And for another reason: the instructions given on behalf of the plaintiff were not excepted to at the time, and, for all that appears in the record, the instructions went to the jury without objection. We can take no notice of exceptions not taken at the proper time and duly saved; and, if this exception had been taken at the time the instructions were given, and this fact had duly appeared in the record, the exception is of such a general character that it does not meet the requirements of the Code, which provides that the statement shall specify the *particular* errors upon which the party will rely.

Exceptions to the charge to the jury ought to point out the specific portions excepted to and to be made at the time of the trial, in order that the judge may have an opportu-

nity, before the jury retires, to correct any error he may have fallen into in the hurry and perplexities of the trial. *Hicks* v. *Coleman et al.*, 25 Cal. 146. And no exceptions to instructions to the jury ought to be regarded, unless the same are made and presented to the court before the cause is finally submitted to the jury.

We come now to the consideration of the questions in the case that are properly before us for adjudication and decision.

The second specification of error is as follows:

"The evidence does not show that the cattle were worth over $2,690 at the time they were levied upon. The evidence does not show that the plaintiff was damaged in any sum over $10 and detention of the cattle. The evidence shows that the cattle belonged to the husband of the plaintiff, C. Griswold, at the time they were levied on and sold by defendants, Hall and Miller."

Upon the subject involved in this specification, we say this: If there is evidence in the case to fairly support the verdict of the jury, this court will not disturb such verdict. It is the peculiar province of the jury to weigh conflicting testimony, and we can only look into the evidence so far as to ascertain that there is testimony to sustain the verdict. If the testimony is in conflict, part sustaining the verdict and part directly the opposite, this should end the inquiry here. Even if we were satisfied that the weight of the evidence was decidedly against the verdict, yet if the verdict is fairly sustained by any evidence in the case, it will not be disturbed unless it shall appear to be the result of passion, prejudice, fraud, accident or mistake. Any other rule would substitute the court for the jury, and would virtually destroy the benefits of a jury trial. For a further elucidation of this subject we refer to the case of *Ming* v. *Truett*, and the authorities therein cited, decided at the August term, 1871, of this court.

We have examined the testimony as to the value of the cattle, and as to the damages for their taking and detention, and we find there is testimony to support the verdict of the

jury in this behalf, and there is nothing in the case tending to show that the verdict was the result of fraud, accident or mistake. And, although that portion of the specification relating to the ownership of the cattle is too general in its character to compel an examination of the evidence in this regard, yet we have looked into the evidence and find there is testimony in the case tending directly to show that the cattle in question belonged to the plaintiff, and that they did not belong to her husband, and the only remaining questions relate to the instruments of evidence and to the competency of the testimony by which this ownership was established.

However, before proceeding to examine this branch of the case we ought to say that there were no exceptions taken to the proof of special damages, and for all that appears the testimony as to special damages was given to the jury without objection; and it is too late to make the objection here for the first time.

1. Was the ownership of the plaintiff established by competent proof?

2. Has the plaintiff by any act become estopped from claiming title and ownership in the cattle?

3. The plaintiff is a married woman, the wife of C. Griswold, one of the defendants, against whom the attachment issued, and the title of the plaintiff depends upon her compliance with the statute of this Territory authorizing married women to hold property in their own right.

Our statute provides as follows (Bannack Stat. 369): "That the property owned by any married woman, before her marriage, and that which she may acquire after her marriage by descent, gift, grant, devise, or otherwise, and the increase use and profits thereof, shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of eighteen years. *Provided, however*, that the provisions of this act shall extend only to such property as shall be mentioned in a list of the property of such married woman, as is on record in the office of the register

of deeds of the county in which such married woman resides."

The testimony shows that before the plaintiff was married she was the owner of a mining claim in Alder gulch from which she realized some $4,000 or $5,000; that after her marriage she took this money east and bought groceries and brought them to this Territory, and sold them, and, with the money arising from such sales, she went to Salt Lake and purchased ninety-one head of cattle in her own name, receiving at the time of such purchase a bill of sale of the cattle, containing a description and the number of the cattle purchased, and a receipt for the money paid, which bill of sale was properly stamped and dated May 11, 1867. This bill was duly recorded in the register s office, for Jefferson county, on the 16th day of August, 1869, and before the debt of defendants was contracted.

On the 11th day of May, 1870, a second list of the same property and the increase thereof was duly recorded with said register, and this record was made before the suit in attachment was commenced.

The object in requiring this list of the wife's property to be recorded, is to give notice to the world, that she is the owner so that her husband cannot obtain credit upon the strength of her property. After this record is made, it is notice to every one, and although the property remains in the possession and control of the husband, the person trusting or giving credit to the husband upon the strength of such property does so at his peril. The statute was designed for the protection of married women, and courts will carry this object into execution when the proper case is made. That the money paid for these cattle originally belonged to the plaintiff in her own right is not disputed; that she became the owner of the cattle by virtue of her purchase, is also admitted. And we think that procuring the original bill of sale, wherein a description of the property is given, to be recorded, and also procuring a subsequent list showing the increase, to be likewise recorded, is a sufficient compliance with the statute.

Indeed, we fail to see why it is not a strict compliance with the language of the act.

With these lists of the property duly recorded with the register of deeds of the proper county, if any one was deceived as to who owned the property, such deception must have been the consequence of his own negligence and carelessness. The record is the best evidence, and is provided alike for the protection of the married woman and the creditor of the husband, and he who fails to avail himself of the notice that the law compels to be given for his protection, suffers from his own act, and is without remedy.

The debt upon which the attachment was issued was contracted by Berkins, Cleveland, Griswold and Munn, who comprised a ditch company, and it was a debt against this company, and it sufficiently appears by the record, that it was not a debt of Cornelius Griswold, contracted for necessary articles procured for the use and benefit of his wife and children. Under the statute, a debt of the husband, contracted for the necessary support of his wife and children, could be collected from the separate property of the wife, but it is perfectly apparent, from the testimony, that the debt under consideration is not one of this privileged character.

Objection is made that the court permitted the plaintiff to show, by general reputation, that she was the owner of the cattle.

If it were true that testimony of this character was introduced and received in evidence, for the purpose of showing title in the plaintiff, the objection would have been well taken, but an examination of the issues in the case will show that this testimony was offered for another and a very different purpose, and, if we understand the issues correctly, was competent proof.

The answer charges that the property in question belonged to Cornelius Griswold, the husband of plaintiff, and that the plaintiff and her husband conspired together, for the purpose of hindering, delaying and defrauding his creditors, and that the claim of plaintiff was fraudulent and void.

Under this allegation, proof was offered by defendants tending to show that plaintiff had allowed her husband to control the property and to call it his, and to exercise acts of ownership over it, with her consent, and that by such acts of the plaintiff, the defendants supposed, and had the right to suppose, that the husband was the owner. And for the purpose of rebutting this allegation and proof, as to fraud and conspiracy by plaintiff and her husband, it was competent and legitimate proof on her part to show, that it was generally known in the neighborhood that the property belonged to plaintiff. This proof was not offered to show title. That the property was originally purchased with plaintiff's own separate money, and that she became the lawful owner thereof, by virtue of such purchase, was not disputed, so that there was no occasion to undertake to show title by reputation, which never could be done, but this proof was offered to rebut the allegation of fraud and deception on the part of the plaintiff, and to show that defendants had not been fraudulently deceived as to the ownership of the property, and for this purpose the testimony was legitimate and competent.

And the time when this proof should have been offered and received in evidence was purely within the discretion of the court. The court can direct the order of proof. To meet the allegation of fraud in the answer, it was competent for the plaintiff in laying her case before the jury to answer this charge, or she could have produced this proof in rebuttal, after the defense had rested their case. Either would have been in order under the direction of the court.

2. It is claimed in the answer, and proof was offered tending to show that the plaintiff stood by and permitted her husband to represent and claim the property as his own, and that in consequence of such claim and representations the defendants were induced to give the credit to said Cornelius Griswold, upon which said indebtedness is founded, and that by reason thereof the plaintiff is estopped from asserting any claim to the property.

At common law the personal property of a married

woman becomes her husband's by his act of reducing the same to possession, and it was subject to be taken to satisfy his debts. This rigorous and unjust rule, by the enlightened legislation of most of our States and Territories, has been so far encroached upon and abrogated as to authorize and permit married women to hold and enjoy their separate property, freed from liability for the husband's debts. Our statute thus enlarges the rights of married women, and provides that their property shall not be subject to the debts of the husband, and it points out the mode by which such property shall be held and preserved. Bannack Stats. 369. When a list of the separate property of the wife is recorded, as required by the statute, it is entirely freed from the debts of the husband, as fully and as completely as if the marriage relation did not exist. When the statute is complied with its prohibition is absolute. And as to this separate property of the wife, it is competent for her to make her husband her agent to take care of and sell and dispose of the same, and after the list of property has been recorded as required, the possession of the husband confers no rights upon him or his creditors. The record is notice, and the possession of the husband raises no presumptions against the wife. The very object in requiring a record is to authorize the husband to retain possession and at the same time provide the means whereby the public shall not be deceived as to the ownership of the property.

After a list of the property has been recorded as required by the statute, the wife cannot be estopped from asserting her claim to the same by her silence, and her silence is what is complained of, no affirmative act being charged against her. If the husband should represent and claim the property as his own, with the knowledge of his wife, this would not be an estoppel, for the reason that she has placed upon record her title, which is notice to all the world, and that record can no more be contradicted by mere verbal declarations of third persons than can a deed. The wife is not obliged to publish the fraudulent conduct or the false assumptions of her husband

It is not claimed that the wife ever made any representations or performed any act tending to show that the property belonged to her husband, but it is claimed that by her *silence* she has permitted the husband to claim the property, and that by her *silence* she has permitted the creditors to be deceived, and that by her *silence* she is estopped. It is a sufficient answer to this claim to say that when the wife caused a list of her property to be recorded with the register of deeds, she was not silent but spoke, not only to the creditors of her husband, but to every one beside, and thereby informed them if they gave credit to her husband, on the strength of her property, they did so at their peril. If lands were conveyed to the wife by a warrantee deed in fee simple which was duly recorded, would the assertion or representation of the husband, in her presence, that the land belonged to him, and was his own property, estop the wife from claiming under the deed? So if the wife has record title to personal property and her husband should claim the same as his own, in her presence, would she be thereby estopped from asserting her claim by the record?

In the case of *The Bank of the United States* v. *Eliza beth Lee et al.*, the court say: "We are asked to deal with the conduct of the wife living in harmony with her husband as if she was a third person, and to decree against her because she did not expose her husband to the community in which she lived, and especially to the complainants, when, within the wife's knowledge, he was holding out her property as his own, and using of it as his own, and obtaining credit upon the faith that he was the true owner. That Richard B. Lee did deal with and use the property in controversy as if he had been its owner, and that the community did believe him the true owner and give him credit on the faith of the property, is no doubt true, and it is very probable that Mrs. Lee knew the fact, but continued passive and silent on the subject. Was it the duty of Mrs. Lee to advertise to the community in which she lived, that her husband had no title to the property on the faith of which he was obtaining credit, but that it was hers? All we need

say is that a court of chancery cannot hold Mrs. Lee responsible for her silence." 13 Pet. 107; *Morrison* v. *Wilson and wife*, 13 Cal. 494.

The doctrine of these cases applies with much stronger force where, in pursuance of the statute, the wife had in the most solemn manner given notice to the public that she was the owner of the property, and that, too, before the husband had obtained any credit upon the strength of her property, and before the debt of the husband was contracted. And here will be seen the competency of the testimony tending to show that the public generally knew that the property belonged to the plaintiff.

The answer does not charge that the plaintiff had done any affirmative act designedly to induce the defendants to give credit to her husband, and the testimony does not go beyond the answer in this respect, but it simply charges, that she had permitted her husband to claim the property as his own, and this, after a public record of the property had been made according to law, is no estoppel.

3. At the time the property was taken by the attachment of defendants, it belonged to the plaintiff, and the taking was unlawful, and no demand for a return of the property was necessary before replevin. The property was taken by the sheriff at the suit of defendants. His taking is their taking. He acts for them as their agent, and his acts are their acts, and both are liable.

Judgment affirmed.

ATCHISON et al., appellants, *v.* PETERSON et al., respondents.

ABANDONMENT — *intention.* The suspension of work upon a ditch, from July 1865, to August, 1866, was not an abandonment, if there was no intention to abandon the same.

WATER — *prior appropriator — quantity and quality.* The first appropriator of water for mining purposes is entitled to the same, as against subsequent appropriators, without material interruption in the flow thereof in quantity or quality.

INJUNCTION — *granting of — facts of case — refusal.* It appeared in this case that the head of a ditch was fifteen miles below certain mining ground; that the owners of the ditch, who were the first appropriators of the water, were compelled, on account of the working of the ground, to construct and maintain a sand reservoir, and use the water ten minutes daily to clean it, and employ, during this time, one man, who was also employed on the ditch for other purposes. The court held that the injuries complained of did not justify the granting of an injunction.

INJUNCTION — *solvency of parties — damages.* An injunction will not be granted if the parties are solvent and the complainants have an adequate remedy at law by bringing a suit for damages.

INJUNCTION — *remedy — injury.* Courts require a very strong case for the granting of an injunction which will cause more injury than it will remedy.

Appeal from the Third District, Lewis and Clarke County.

THIS case was tried by the court, WADE, J., in November, 1871, who rendered a judgment for Peterson, and Atchison appealed. The facts appear in the opinion.

CHUMASERO & CHADWICK, for appellants.

Appellants were injured by the filling in of the ditch with sand and sediment, which required the services of one man extra to keep the sand out, and diminished the capacity of the ditch, and caused more labor to clean out the ditch in the spring. The court below ignored the evidence upon these points. Appellants were compelled, in the summer of 1871, to reduce the price of water ten cents per inch, owing to the same being rendered muddy by the mining of respondents. This reduction amounts to from $40 to $45 daily, the capacity of the ditch being from four hundred to four hundred and fifty inches. Yet the court finds that appellants are not injured by the deterioration of the water.

The court also ignored the evidence of appellants regarding the cleaning out of the ditch in the spring, and finds that appellants are not materially injured. The testimony shows that the work of cleaning out the ditch in the spring would be little or nothing, if it were not for respondents' mining. In 1871 appellants were compelled to expend $500 extra to what would have been necessary if respondents had not filled up the ditch. If such evidence does not show an injury, we do not comprehend the term.

The ditch had only one-half of its original capacity on account of sand, and appellants were damaged by the diminished quantity of water sold in 1870. The evidence showed that an extra man was required on account of the sand. His wages were $125 per month, or about $1,000 for the mining season. And yet the court finds that appellants are not materially injured.

If appellants were entitled to the use of the water as pure as they appropriated it, they are entitled to the protection which can only come from a court of equity. *Bear R. Co.* v. *York M. Co.*, 8 Cal. 333; *Butte C. & D. Co.* v. *Vaughn*, 11 id. 153; *Phœnix W. Co.* v. *Fletcher*, 23 id. 484; *Hill* v. *Smith*, 27 id. 480; S. C., 32 id. 166.

Appellants do not claim that respondents should be enjoined from working their mining ground. They only ask that respondents be enjoined from running their tailings down into appellants' ditch. This can be done by the erection of slum dams on Ten Mile creek. The judgment should be modified to allow this to be done. Appellants have expended $117,000 in valuable works, and should be protected from the acts of those who come after them and seek to destroy their property.

If respondents are responsible, this is no reason why they should not be enjoined. Courts of equity always interfere to prevent a multiplicity of suits. In this case appellants would be compelled to bring many suits against respondents to recover their damages year after year.

SHOBER & LOWRY and G. G. SYMES, for respondents.

The only way by which the decision of a court on the facts can be reviewed is by demanding written findings. *Sanchez* v. *McMahon*, 35 Cal. 225. No written findings were demanded by appellants, as required by law. Civ. Prac. Act, § 180. There were no written findings, and no instructions offered or given, or refused, and no exceptions were taken.

The statement does not contain a specification of the particular errors relied on, and should be disregarded. Civ

Prac. Act, § 195; 3 Estee's Pl. 575; *Hutton* v. *Reed*, 28 Cal. 478; *Beans* v. *Emanuelli*, 36 id. 118.

If the record showed proper assignments of error, there is a conflict of evidence, and the findings of the court on the facts could not be set aside. *Frost* v. *Hartford*, 40 Cal. 165. The testimony preponderates in favor of respondents.

The party mining above on a stream has the right to use the water and turn it back into the channel. If parties below are slightly injured, it is *damnum absque injuria*. *Bear R. & A. W. Co.* v. *York M. Co.*, 8 Cal. 332; *Hill* v. *King*, id. 337; *Hill* v. *Smith*, 27 id. 479; *Phœnix W. Co.* v. *Fletcher*, 23 id. 483.

The question of a considerable injury to the water and ditch is a question of fact, on which there is a conflict of evidence. The findings of the court on facts will not be set aside unless the evidence was such that a verdict would be set aside as contrary to evidence. *Moore* v. *Murdock*, 26 Cal. 515.

The opinion of the court below is not a finding. 3 Estee's Pl. 432, and cases cited.

Appellants must make out a case showing a clear necessity for the issuance of an injunction. Hill. on Inj., §§ 16, 18. The granting of an injunction in this case would cause great injustice and injury to respondents. Injunctions are sometimes refused on this ground. Hill. on Inj., § 22.

The remedy of injunction is only granted in the absence of an adequate legal remedy. Hill. on Inj., § 25. Respondents are solvent, as shown by the evidence, and able to respond in damages.

WADE, C. J. This is a suit brought by the owners of the Helena Water Ditch Company against the defendants, for an injunction to restrain their mining operations on the upper Ten Mile creek. The plaintiffs' ditch taps the creek about fifteen miles below the mines of defendants, on the same stream, and the plaintiffs claim to be the prior appropriators of the waters of the creek or so much thereof as is necessary for the purposes of the ditch, and that the mining operations

of the defendants injure and damage the waters of the stream, and the ditch of the plaintiffs.

The testimony of the plaintiffs establishes the fact that the plaintiffs commenced their ditch in November, 1864, and continued work thereon until July, 1865, expending within that time about $23,000 thereon, and completing two-thirds of the digging required to complete the ditch, when their money failed, and the work suspended. No more work was performed on the ditch until August, 1866, but the company continued in possession and claiming the ditch until August, 1866, when they sold the same for $4,000, and work thereon was resumed, and the ditch completed and put in operation in 1867. There was no abandonment of the ditch within the meaning of the law, for when the work was suspended there was no *intention* to abandon, and the subsequent sale for a valuable consideration showed the property to be valuable, and there was, in fact, no abandonment of possession.

The testimony further shows, that in 1865 there was mining on the upper Ten Mile for two or three months on a small scale, but there was no continuous mining there until 1867, and since that time the proof is not satisfactory as to the continuance or extent of the mining there. The plaintiffs are clearly the prior appropriators of the waters of the Ten Mile creek to the capacity of their ditch, as against the defendants, and as such are entitled to the unobstructed use and flow of the water.

2. The facts herein shown are sufficient to demonstrate that the right to bring this action is not barred by the statute of limitations.

3. The only remaining question, and upon the decision of which the fate of this case depends, relates to the injury and damage to the plaintiffs, and their ditch, and the waters thereof in consequence of the mining operations of the defendants. The volume of the waters of the stream is increased by tributaries flowing into it between the head of plaintiffs' ditch, and the mines of defendants from fifteen to eighteen miles above, about five-sixths, that is to say, the

stream where plaintiffs' ditch taps it is about six times as large as at the point where the mining operations of defendants are carried on. If twelve hundred inches of water flow down the stream opposite the head of plaintiffs' ditch, two hundred inches thereof, or in that proportion, would come from the upper Ten Mile at the point where the defendants are mining. The tailings of the defendants are cribbed, and this two hundred inches of water, after having been used for mining several times, flows down the stream for fifteen or eighteen miles to the head of plaintiffs' ditch, but before reaching that point is mixed with ten hundred inches of pure water, and in this condition it enters the ditch of plaintiffs. It then flows through the ditch for thirteen miles and is used for mining purposes in Last Chance gulch.

It is admitted that the mining of defendants does not diminish the flow of the waters of the creek, and the testimony is entirely conclusive upon the proposition that the water after reaching the mines of Last Chance, where it is used, is first-class water for mining purposes, and that it is not diminished in quantity or quality at that point. Then the only remaining question relates to the injury and damage to the ditch caused by the flow of this water through it.

There is abundance of testimony tending to show that the water will become clear after having been used for mining, in flowing five or six miles, while, upon the other hand, there is proof going to show that roily water will never become pure as long as it is in motion; and this latter view is the most satisfactory, and I have not much hesitation in saying, judging from the testimony, that the waters of Ten Mile creek, at the point where the plaintiffs' ditch taps the same, are discolored, and carry a certain amount of sediment in consequence of the mining of defendants. Before this mining commenced the waters of the creek were pure.

Now let us examine the extent of the injury to the ditch. The water is not injured, as we have already shown. Then the only injury that could result is in filling the ditch and in constructing and tending the necessary apparatus to keep the sand and sediment from entering the same.

The ditch had to be cleaned each spring, and did before the mining of defendants commenced, and it is not very satisfactorily shown that the cleaning required any considerable more labor since the mining than before. Certainly the flow of the water has not been materially obstructed since the mining commenced. But the proof shows this fact, that the plaintiffs have been compelled to construct a sand gate or reservoir, to catch the sand and sediment, and that this, during the mining season, fills every twenty-four hours, and that the waters of the ditch had to be used from ten to twenty minutes each day in cleaning this gate or reservoir, and that one man's services are necessary for that time to clear the sand and sediment from the reservoir. The testimony shows that this ditch is divided into three sections, and that the services of one man to each section is constantly employed, and was before there was any mining on the creek, to keep the ditch in running order. Mr. Atchison thinks that two men might probably attend to the ditch if it was not necessary to tend the sand gate. Then the extent of the injury and damage is reduced to this: the construction of a sand gate, the use of the water ten minutes each day to wash and cleanse it, and the services of a man for that length of time who is necessarily employed in other services on the ditch, and is not, especially there for the purpose of tending the sand gate, but is on the ditch for general services, working by the month.

Does the case come within the range of the decisions cited by appellants in the California Reports? We will examine those cases. In the case of *Hill* v. *Smith*, 27 Cal. 480, the defendants had been engaged for four weeks in digging up the bed of a creek at points from six hundred feet to one thousand feet above the head of the ditch, and washing down the earth and water into the ditch, thereby mixing the earth and mud with the water, and that in consequence thereof the sales of water were injured, and the use of the mines destroyed; where the plaintiff had previously sold sixty inches of water she was compelled to sell one hundred

and twenty inches at the same price, in consequence of the deterioration of its solvent capacity, by reason of the sediment and mud from defendants' mining claim, and that some of the miners quit work entirely in consequence of the muddy water. Is this case parallel in any sense to the case at bar? Here the mining was only six hundred feet to one thousand feet from the head of the ditch, while in the case under consideration it is at least fifteen miles away, and a large volume of pure water mixes with the water from the mines before reaching the ditch.

The case in the 23d Cal. 480, *Phœnix Water Company* v. *Fletcher*, shows this state of facts. The plaintiffs were the prior appropriators of the waters of the stream, and had constructed a ditch for mining purposes. The defendants erected a dam across the stream above the plaintiffs' ditch for the purposes of a saw-mill, and caused the waters to flow irregularly, at times holding it back, and suffering but a small quantity to flow to plaintiffs' ditch, and at other times letting it down in greatly increased quantity, and that the saw-dust and refuse bark of the mill is thrown into the stream by the defendants, clogging and filling the plaintiffs' ditch and reservoirs, and thereby diminishing their capacity to flow and hold water, and that thereby serious injury was caused to the plaintiffs. The exact nature and extent of the injury is not stated, but it may well be supposed that the irregularity in the flow caused by the mill and dam of defendants was the chief source of damage, as that was one of the principal points decided in the case, and as to this point the doctrine in the case of *The Bear River and Auburn Water and Mining Company* v. *The New York Mining Company*, 8 Cal. 327, that the first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel, is approved and confirmed.

In the case under consideration, there was no material, if any, interruption in the flow of the stream, and no complaints from the miners for irregularity in the supply of water from the ditch.

The doctrine that the first appropriator of water for mining purposes is entitled to the waters of a stream as against subsequent appropriators without material interruption in the flow thereof, or in quantity or quality, is fully recognized. This proposition has been too long established in this mining region to be now called in question, and I apply this doctrine to the case in hand.

The water of Ten Mile creek, at the place where it enters plaintiffs' ditch, is first-class water for mining purposes. It is of the same quality when it reaches the mines of Last Chance, and the only damage to the plaintiffs, in consequence of the mining of defendants, is the work of one man for from ten to twenty minutes each day and the use of the waters of the ditch for that length of time, and this service is performed by a man working by the month, and his pay is not thereby increased. This sand gate is effectual in its operation, and the task of cleaning the ditch each spring is not materially increased in consequence of the mining above.

Then it only remains to say that the nature and extent of the injury complained of is not such as would authorize or justify the granting of the injunction prayed for.

Mining upon the upper Ten Mile will cause the waters of the stream to be discolored, and to carry a certain amount of sediment for many miles below plaintiffs' ditch, and to grant the injunction would necessarily cause the defendants to cease mining.

There is one further consideration. The defendants are shown to be responsible for their acts. Their mining claims are shown to be worth from $15,000 to $20,000 each, and this testimony is not disputed, and there is no testimony tending to show the insolvency of defendants, and for the purposes of this case they must be taken to be solvent and responsible. The office of an injunction is to prevent an irreparable injury, and it is not applicable to those where the parties have an adequate remedy at law. In this case, if the defendants have injured the plaintiffs, a suit for dam

ages would be the appropriate remedy, the defendants being responsible and solvent.

It would require a very strong case for an injunction to justify the granting thereof, when such an act would cause infinitely more damage than it would remedy, *and* this is the case at bar.

The matter of granting or refusing an injunction is very much in the discretion of the court, and we think a sound discretion was exercised in the case at bar.

Judgment affirmed.

CALDWELL et al., appellants, *v.* GANS et al., respondents.

REPLEVIN UNDERTAKING — *sureties — return of property.* The sureties in an undertaking in replevin are released from their obligation to return the property, if it is taken by due process of law, without their fault, and held or sold, so that a return is rendered impossible.

REPLEVIN — *possession of property — attachment.* The proceedings in replevin give a right to the temporary possession of the property without any title, until the right of possession is tried and determined, and do not impair the lien of an attachment that has been levied on the property.

REPLEVIN UNDERTAKING — *obligation of sureties.* The sureties in an undertaking in replevin must return the property after a judgment has been rendered for such return, if it is in their power so to do; and they are entitled to the property, if they pay the judgment in the suit in which the property has been attached.

REPLEVIN UNDERTAKING — *compliance with — condition.* The condition of a replevin undertaking, to return the property, is complied with, if the sheriff acquires possession of the same under a subsequent attachment or execution.

EVIDENCE — *replevin undertaking — defense of sureties.* It is not competent for the sureties, in a replevin undertaking, to prove that the owner had no attachable interest in the property, or that the attaching creditor was not injured by their failure to return the same.

Appeal from the Third District, Lewis and Clarke County.

THIS case was tried in July, 1871, by a jury, that returned a verdict for Gans. The court, WADE, J., overruled the motion for a new trial. The facts appear in the opinion.

CHUMASERO & CHADWICK, for appellants.

The first ground of defense to this case, that the sureties were released by the sheriff retaking the property upon a second writ of attachment, is untenable. There is no authority in law to sustain such a proposition. Justice would be easily defeated if this is law. The lien of the first attaching creditor is destroyed by the acts of third parties, in replevying and attaching the property, and he is without a remedy. Appellants attached the property of Germain, and Dahler replevied it, by giving a good bond. Clark attaches the same property. Is this a defense to an action on the bond given by respondents for the benefit of appellants? Dahler confessed that he had no action, by dismissing his suit, and was ordered by the court to return the property, so that appellants' judgment in the attachment suit could be satisfied. Dahler replevied the property, after Clark attached it, and held it for months, until it was sold by his orders. Dahler never returned the property to the sheriff, and refused to comply with the order of the court. If it had been returned to the sheriff, it would have been held to satisfy the attachments of appellants and Clark. The position of respondents, that the return of the property was rendered impossible by the act of the sheriff, has no foundation in fact.

The evidence shows that the suit of Clark against Germaine was commenced under the direction of Dahler, to enable him to get the property again into the hands of the sheriff, and delay and prevent appellants from collecting their claim against Germain. The cases of *Clark* v. *Germaine*, and *Dahler* v. *Steele* (the sheriff), were continued from term to term, nearly two years. The law will not benefit a party who resorts to such trickery and chicanery.

The cases of *Hunt* v. *Robinson*, 11 Cal. 262, and *Hayes* v. *Josephi*, 26 id. 535, cited by respondents, are inapplicable to the case at bar. We admit that the decisions are good law.

The sheriff was unable to find the property, after the remittitur in the case of *Dahler* v. *Steele* had been filed in the court below. This would certainly fix the liability of the sureties upon the replevin bond. Dahler, by his acts,

sold the property for his benefit, and placed it beyond his power, or that of the sureties, to return it.

The court erred in admitting the papers, in the case of *Clark* v. *Germain*, and *Dahler* v. *Steele* (second suit). They constitute no defense to this action. The admission of the papers in the case of *Dahler* v. *Germain*, and the report of the sale of the property, was error. They were irrelevant, and calculated to mislead the jury. Hill. on New Trials, 312–315, and cases cited; *Santillan* v. *Moses*, 1 Cal. 93; *Innis* v. *Steamer Senator*, 1 id. 461. This evidence had nothing to do with the defense made by respondents. If the retaking of the property of the sheriff released the sureties on the replevin bond, when such retaking was proved, the defense was made out.

A plea that the title to property replevied was not in the debtor against whom the attachment issued, is bad in an action on the replevin bond, after a determination adverse to the plaintiff in replevin. *Smith* v. *Lisher*, 23 Ind. 500; *Mitchel* v. *Ingram*, 38 Ala. 395.

The appellants were not made parties to the suit of *Dahler* v. *Germain*, for the foreclosure of Dahler's mortgage. They were not bound by the decree therein, and the introduction thereof, as evidence, was error.

The court erred in its instructions. The question of the power of the sheriff to return the property had nothing to do with the case. If the property had been returned, the sureties in both replevin cases would have been relieved, and the judgments of appellants and Clark could have been satisfied by the sheriff.

The court had no right to modify instructions that were law and applicable to the evidence. *Conrad* v. *Lindley*, 2 Cal. 173; *Russell* v. *Amador*, 3 id. 402; *Jamson* v. *Quivey*, 5 id. 491.

The property was not in the possession of the coroner for Dahler as held by the court. Civ. Prac. Act, § 104.

SHOBER & LOWRY and E. W. TOOLE, for respondents.

When the property came again into the hands of the

sheriff, as appears by the evidence in this case, the condition of the replevin bond to return the property was fulfilled. *Hunt* v. *Robinson*, 11 Cal. 262.

After the replevin suit had been dismissed, it left the parties to settle the question as to the value of the property and the right of possession, on the undertaking in the case. *Mills* v. *Gleason*, 21 Cal. 280. The question as to who had the actual possession of the property was properly submitted to the jury.

The undertaking was given to the sheriff (Steele) as if he was a trespasser in the case. What right had appellants to bring this suit in their names? It is not alleged that Steele was the trustee of an express trust, and there is no assignment of the bond.

If the sheriff retook the property and let it go again, he must look to the second bond; the first is discharged. *Hunt* v. *Robinson*, 11 Cal. 262; *Hayes* v. *Josephi*, 26 id. 535; *Curiac* v. *Packard*, 29 id. 198.

The complaint is defective in alleging that the property was held by the sheriff for appellants and other creditors. Respondents' demurrer should have been sustained.

Dahler dismissed his first replevin suit because the sheriff retook the property and had it in his possession.

WADE, C. J. This is an action on a replevin bond, and the cause comes into this court on appeal from a judgment for defendants in the court below.

A statement of the facts, as shown by the record, will be necessary to a correct understanding of the case.

On the 29th day of January, 1870, the plaintiffs commenced a suit in attachment against one Germain, and levied upon certain personal property belonging to Germain, which at that time was in the possession of one Dahler, by virtue of a mortgage by Germain to Dahler, July 1, 1869.

On the 3d day of February, 1870, four days after the plaintiffs' attachment, Dahler commenced his action against

Steele, sheriff, and replevied the attached property, and herein the undertaking or bond in replevin was given upon which this suit is instituted. In this action such proceedings were had as that, on the 15th day of March, 1870, the action was dismissed, and judgment for the return of the property duly given; but prior to this, and while the action was still pending, to wit, on the 12th day of March, 1870, the property was again attached at the suit of one Clarke against Germain, and taken into the possession of Steele, sheriff, and upon the same day was again replevied by Dahler. On the 23d day of March, 1870, these plaintiffs recovered a judgment against Germain for the amount of their claim, upon which execution was issued and returned unsatisfied, and on the 27th day of January, 1871, they bring their action against these defendants, who were and are sureties upon the bond in replevin in the first suit of Dahler against Steele, sheriff, and on the 22d day of July, 1870, Dahler forecloses his mortgage and procures a decree to sell the property covered by his mortgage, which is the same property levied upon by plaintiff's attachment, and replevied by Dahler, and again attached by Clarke; and, in pursuance of such decree, the sheriff takes possession of the property and sells the same, realizing therefrom an amount insufficient to satisfy said decree.

Upon this state of facts, are these defendants liable upon their undertaking?

The condition of the undertaking or bond of defendants is "for the prosecution of the said action for the return of said property to said defendant, if return thereof be adjudged, and for the payment to said defendant of such sum as may, from any cause, be recovered against the plaintiff."

The action of Dahler against Steele, sheriff, was dismissed, and judgment for return of the property duly rendered, and return was not made, and thereby the condition of the undertaking was broken, but prior to the judgment of return, and while the property was in possession of Dahler, by virtue of the undertaking of defendants, it was attached at the suit of Clarke, and thereby

came again into the possession of Steele, sheriff, defendant in the suit of claimant. This attachment of Clarke, by virtue of which the property was taken from the possession and control of claimant and his sureties, rendered it impossible for the sureties to perform the judgment for a return of the property. By reason of a lawful process issued from the court the property is placed beyond the reach of the claimant and his sureties, and without any fault or neglect on their part, and by operation of law, the property is taken beyond their control.

Does this inability of the sureties to perform the judgment of return, relieve and release them from liability upon their undertaking?

At the time the proceedings in replevin were instituted, and the undertaking given, the property was in the custody of the law. The sheriff held it by virtue of plaintiffs' attachment, and for the plaintiffs, and it will be necessary to inquire into the nature and extent of plaintiffs' lien under this process.

If plaintiffs' lien upon the property continued in full force and operation notwithstanding the proceedings and undertaking in replevin, and their rights were not thereby injured or impaired, and if, after judgment of return in the replevin suit, the property was subject to their control as against defendants, and if Clarke acquired no rights by virtue of his attachment except subject to the rights of the plaintiffs, then to hold that the sureties are still liable upon the undertaking would place the means in the hands of plaintiffs to collect their debt twice, once from the property attached, and once from these defendants upon their undertaking for if the lien of the attachment continues, and thereby subjects the property to the control of plaintiffs, they could immediately possess themselves of the property, and by the very act of obtaining possession would cause a forfeiture of the bond, so that by securing their debt from the property they create a liability against defendants by which they are again entitled to collect their debt.

The theory upon which the sureties are held upon their

undertaking, after a judgment for return of the property, and default thereon is, that they have the property in their possession or under their control, and that they have the power to return it. If the sureties pay the judgment they are entitled to the property. The law gives them the property for the judgment. And their liability comes from the fact that having the property they prefer to keep it and pay the value thereof. But if plaintiffs' lien continues on the property after judgment of return is given, and they thereby have the right to control it to the exclusion of the sureties, and it is placed beyond their reach by authority of the law, then to render judgment against them would produce this result: the plaintiffs would have the property whereby their debt is secured, and also a judgment for its value whereby it is secured again, while the sureties, instead of having the property as they are supposed to have as a compensation for the judgment for its value, would be entirely without remedy, and this injustice would follow: That plaintiffs would collect their debt twice, and once from innocent parties who have received no consideration therefor and who have been guilty of no neglect in the premises.

The law will not thus lend its aid to rob one person that another may receive twice what belongs to him, and the result of this case must turn upon these questions:

1. Did plaintiff's lien, by virtue of his attachment, continue, notwithstanding the proceedings in replevin? and,

2. The property coming again to the possession of the sheriff by virtue of Clarke's attachment, and thereby being placed beyond the power of sureties to return the same, does not such inability of the sureties, and such possession of the sheriff, fulfill the condition of the undertaking to return the property?

As applicable to the foregoing questions, we think the following propositions can be maintained:

1. The possession of goods in replevin by virtue of the undertaking is a temporary possession, and continues only until the right of possession has been tried and settled. If, after giving the undertaking, the plaintiff should sell the

property, the purchaser would acquire only the title of the plaintiff, which might be no title at all. The plaintiff could sell only the title he possesses, and that title depends upon the result of the trial. If it were true that, by giving the undertaking, the title to the property was thereby transferred, then it would follow that the plaintiff could sell and convey a complete title; but this cannot be the case, for the reason that the undertaking contemplates *a return of the property* if judgment of return be given, and a sale before judgment would defeat the very purpose of the suit. The object of the action is the *specific property* in question, and judgment for the value is only given *when the property cannot be reached.*

2. If the undertaking carries with it the title, the property would be subject to levy, execution and sale, and thereby the primary object of the suit, *the property itself*, would be defeated. And if the property is subject to execution and sale, the law would thereby authorize the means whereby a return of the property would be rendered impossible, and the discharge of the undertaking would be defeated, and yet the sureties would be subject to a penalty for failing to perform it.

Upon this subject we adopt the language of Justice MCLEAN in *Hogan* v. *Lucas*, 10 Pet. 400, and say: "If the property be liable to execution, a levy must always produce a forfeiture of the condition of the bond, for a levy takes the property out of the possession of the claimant and renders the performance of the bond impossible. Can a result so repugnant to equity and propriety as this be sustained? Is the law so inconsistent as to authorize the means by which the discharge of a legal obligation is defeated, and at the same time exact a penalty for the forfeiture? This would, indeed, be a reproach to the law and to justice."

This theory would give the property to a party confessedly in the wrong, and authorize him to convert it to his own use at pleasure, while he could only be held to account

for its value. The law does not give any such privilege to a wrong-doer.

3. If the undertaking in replevin gives only a temporary right to the possession of the property, and does not carry with it the title, then the lien of the attachment is not disturbed or impaired, and, after judgment of return, the attachment controls the property. And, if subsequent attachments or executions should be levied upon the property during the pendency of the proceedings in replevin, or afterward, such attachments or executions would be subject to the lien of the first attachment; and if the property, by virtue of such second execution or attachment, should come again to the possession of the sheriff, the condition of the replevin bond to return the property is fulfilled.

4. If after the undertaking in replevin is given, the property is again taken by due process of law, and held or sold, and thereby a return is rendered impossible, this fact would discharge the obligation of the sureties to return the property.

In support of the foregoing propositions we cite the following authorities: *Hunt* v. *Robinson*, 11 Cal. 262; *Buckle* v. *Luce*, 1 Comst. 171; *Lockwood* v. *Perry*, 9 Metc. 444; *McRea* v. *McLean*, 3 Porter, 138; *Evans* v. *King*, 7 Mo. 411; *Hogan* v. *Lucas*, 10 Pet. 400; Drake on Attach., §§ 290, 299, 303.

Suppose that the sheriff, by virtue of an execution, levies upon the property of A and advertises the same for sale; B claiming the property replevins it, causes an undertaking to be given and obtains possession of the property. The suit in replevin results in favor of the defendant, and judgment for return is given, and immediately the sheriff, by virtue of his execution, repossesses himself of the property, thereby placing it beyond the power of B or his sureties to perform the judgment of return, and thereby creating a breach of the undertaking. Can it be contended that the execution creditor could thus secure the property and, by his own act, cause a forfeiture of the undertaking, and at

the same time have a remedy against the sureties for breach of their bond? Or in the case supposed, if there was a second execution upon the property, during the pendency of the proceedings in replevin, whereby the property came into the possession of the sheriff and was sold, and by operation of law was placed beyond the reach of the sureties or claimant, could it be claimed that the sureties would be held for a return of the property when the law had made such return impossible?

Both reason and authorities fully warrant us in saying that the law does not thus stultify itself, and we say that the lien of attachment continues unimpaired during the proceedings in replevin, and when the same property came again into the hands of the sheriff, by virtue of subsequent attachments or executions, the condition of the undertaking in replevin to return the property was fulfilled and the sureties discharged.

In the case of *Hunt* v. *Robinson*, 11 Cal. 262, this view is fully maintained. In that case Treadwell commenced a suit against David Jones by attachment, which was levied upon certain personal property by the plaintiff, Hunt, as sheriff. Mary Jones, wife of David Jones, claimed the property as sole trader, and commenced her action of replevin, and obtained possession of the property upon giving an undertaking in replevin with these defendants as sureties. The replevin suit was decided on the 5th day of February, 1855, in favor of Hunt, and a motion made for a new trial by Mrs. Jones, which was overruled on the 9th of March, 1855. Treadwell obtained judgment against David Jones November 30, 1854. On the 18th of February, 1855, certain executions in favor of *other* creditors of David Jones being in the hands of Hunt, plaintiff, were levied upon the same property, and the property sold about the 1st of February. The sheriff being in doubt as to which of the several creditors were entitled to the proceeds of the sale, paid the money into court, and filed his bill of interpleader, making the creditors parties. Upon the hearing the court decided that the second class of creditors were entitled to

the proceeds. From this decision there was no appeal. On the 17th day of March, 1855, Hunt issued an execution upon the judgment obtained by him in the replevin suit, which was returned unsatisfied. The sheriff then brought his suit against the sureties in the replevin bond and obtained a judgment against them for the assessed value of the property replevied, and the defendants appealed.

In many important particulars this case is parallel to the one at bar. In this case the property is attached, it is then replevied, and during the pendency of the suit in replevin, the same property is taken upon execution in favor of *other* creditors of Jones and sold, by reason of which subsequent execution and sale, the property comes again to the possession of the sheriff, and is placed beyond the reach of the sureties to perform the judgment of return. In the case at bar the property is attached by Caldwell and Ingram. It is then replevied by Dahler, and during the pendency of the suit in replevin, the same property is attached by Clarke, and comes again to the possession of the sheriff, and is subsequently sold by virtue of Dahler's mortgage, and the sureties are, by virtue of said subsequent attachment and sale, prevented from performing the judgment of return. In both cases there was a judgment for return of the property, and in either case the sureties in the undertaking were prevented from making return by subsequent levies in attachment or execution upon the same property.

In the case referred to (*Hunt* v. *Robinson*), the court make an elaborate and exhaustive examination of the authorities, and reverse the judgment against the sureties, for the reason, that when the property came again to the possession of the sheriff, by virtue of the subsequent executions, the condition of the replevin bond to return the property was fulfilled, and for the further reason, that to hold otherwise, would impose upon the party replevying the property the extraordinary risk of having to pay the judgment, and also to lose the property.

We adopt this view, and say: That according to every principle of law and practice, if the sureties in the under-

taking in replevin are compelled to pay the value of the property, they are entitled to the property itself. But it is conceded that they cannot get the property, that having been taken from them and sold by virtue of subsequent executions, and if a judgment should be rendered against them for the value of the property, they would be compelled to pay for what they never enjoyed, and this without any fault or neglect on their part, and purely by operation of law over which they had no control.

Again: If a judgment is rendered against these sureties, this result must follow: Germain who is justly indebted to these plaintiffs, and against whom they have obtained a judgment, would be enabled to pay the judgment without parting with any of his property, while these sureties would be compelled to pay for what the law had taken from them, and for which they have not received any benefit, and thus the defendant in attachment or execution obtains two prices for his property. "This, indeed, would be a reproach to law and justice."

But the theory that the replevin of Dahler does not destroy the lien of Caldwell and Ingram's attachment does justice to all the parties. Clarke's attachment is subject thereto, and is a subsequent lien, and the property coming again into the possession of the sheriff, the lien of plaintiffs as well as that of Clarke is preserved; the plaintiffs are placed in the same position as before the replevin suit, the property is in the hands of the sheriff, the lien of plaintiffs is unimpaired, and the only damage plaintiffs could have suffered would have been the detention of the property from the date of plaintiffs' suit to the date of Clarke's, which was but a few days, and the damage to the plaintiffs for this detention from the sheriff could be only nominal in any event.

5. The record shows that Dahler foreclosed his mortgage against Germain and procured a decree and order of sale, and that, by virtue of such proceedings, the sheriff sold the property in question, and applied the proceeds thereof to satisfy said decree. These proceedings demonstrate the fact

that plaintiffs obtained no possible interest in the property attached, and that they were not in any manner injured by the replevin of the property by Dahler, and that Germain had no attachable interest in the property. This proof is incompetent in a suit against sureties upon a replevin bond. Neither in such a case would it be competent to show the property in the plaintiff in replevin, or that he was a part owner therein, or that the property belonged to a stranger. The obligation of the sureties in the undertaking is to return the property if judgment of return be awarded, and they are not relieved from this obligation by showing that the attaching creditor is not injured by their failure to return the property. Title is not the subject of inquiry in such a suit. But the record in the case of Dahler against Germain shows, that after the plaintiffs' attachment, and after the undertaking in replevin was given, the property was again taken by process of the law and sold, and that its return was thereby made impossible. This proof shows that the property came again to the possession of the sheriff, and as we hold that such possession fulfills the condition of the undertaking to return the property, this testimony showing such return was properly admitted and received in evidence. And the only damage that could result to the plaintiffs would be the difference between the sheriff holding the property for Dahler, and Dahler holding it for himself.

But Clarke's attachment is conclusive of the case. It brings the property again to the possession of the sheriff, and thus fulfills the condition of the undertaking. It is idle to say that because Dahler immediately replevied the property after Clarke's attachment, and thereby obtained possession, it was in the power of his sureties in the first replevin suit to perform the judgment of return. The levy of the attachment just as effectually takes the property beyond the reach of the sureties, as if it had been sold on execution. And when the property is delivered to Dahler by virtue of the second suit in replevin, a second undertaking with sureties is given for the return of the property, and it cannot be taken by the first sureties without injuring the rights

of the second sureties. Other rights have intervened that cannot be impaired. And suppose the second sureties held a mortgage upon the property for their security, which they had a right to take and hold, or that they had possession of the property for the same purpose, by what right could the first sureties take it from them? Their equities are equal and the law would not permit them to interfere with the property to the injury of the second sureties.

Then if the property did come to Dahler's possession, and was so in his possession when the judgment of return was given, it was so incumbered with the rights of other parties that had accrued since the making of the first undertaking that a return thereof was impossible, and this impossibility resulted from the operation of law, and over which the sureties had no control.

Suppose the second suit had been dismissed and judgment for a return of the property rendered, or suppose a trial had resulted in such a judgment, but in the mean time the property had been taken by the first sureties, by what principle of right or law shall the second sureties lose the property and be made to pay its value for the benefit of the first sureties?

The only reasonable road out of these difficulties is to say that the attachment of Clarke, and the second undertaking in replevin, places the property beyond the power of the sureties to perform the judgment of return, and this discharges the bond.

The instructions to the jury in the court below were in conformity with the views herein expressed, and we find no error therein.

The judgment of the court below is affirmed.

LOMME, respondent, *v.* SWEENEY et al., appellants.

REPLEVIN UNDERTAKING—*liability of sureties—damages.* The sureties in an undertaking for the claim and delivery of property, that is in the hands of a sheriff under the writ of attachment, are liable for the damages which may be sustained by the officer and the attaching creditor, by a failure to return the property.

REPLEVIN UNDERTAKING—*parties—action for damages by creditor.* An action for damages against the sureties on a replevin undertaking, which has been executed and delivered to the sheriff, can be maintained by and in the name of the creditor that caused the officer to attach the property that has been replevied.

ATTACHMENT—*officer is trustee for creditor.* An officer that has levied upon property, holds the same and receives an undertaking, if it is duly taken from his possession, as a trustee for the benefit of the attaching creditor.

PRACTICE—*judgment for return of property—value.* In an action of replevin, a judgment for the return of property, which does not fix its value, if a return cannot be had, is irregular, but not illegal or void.

REPLEVIN UNDERTAKING—*sureties—statute—judgment.* The liability of the sureties in a replevin undertaking cannot be extended by statute, or the judgment entered in the action.

REPLEVIN UNDERTAKING—*contract of sureties.* The sureties in a statutory undertaking, for the claim and delivery of property, contract that the principal will return the property, and that they will pay any judgment that may be recovered against the principal.

CASES DOUBTED. The cases of *Nickerson* v. *Chatterton*, 7 Cal. 568, and *Clary* v. *Rolland*, 24 id. 147, doubted.

REPLEVIN UNDERTAKING—*evidence of ownership.* The defendants, in an action on a replevin undertaking, cannot show that the title is in a stranger.

REPLEVIN UNDERTAKING—*sureties—writ retorno habendo.* The sureties in a replevin undertaking can be sued, if the property is not returned after a judgment therefor, before a writ *retorno habendo* has been issued and returned unsatisfied.

PLEADING—*replevin—value of property.* In an action of replevin, the value of property must be alleged by the party that demands judgment for its value, if it cannot be returned.

REPLEVIN UNDERTAKING—*demand.* An action can be brought against the sureties in a replevin undertaking, before a demand has been made for a return of the property.

Appeal from the Third District, Lewis and Clarke County.

THIS action was tried by a jury that found for Lomme, and the court, WADE, J., entered judgment thereon. The facts appear in the opinion. The case of *Lomme* v. *Kintzing*, is reported *ante*, 290.

E. W. TOOLE and SHOBER & LOWRY, for appellants.

Respondent had no right to sue upon the undertaking executed to Roberts in the replevin suit. The undertaking was never assigned to respondent. Civ. Prac. Act 1867, §§ 109, 123, 131, 134, 137, 216, 217, 218. The sheriff must make the judgment creditor's demand, out of property attached by him. The bail-bond was substituted for the property in this action. The rights and duties of the sheriff are the same at common law as by statute. Barb. on Part. 22, 31, 34, 36; Morris on Replev. 264; 1 Estee's Pl. 56, § 17; *Seaward* v. *Malotte*, 15 Cal. 304; *Green* v. *Burke*, 23 Wend. 489; *Foulks* v. *Pegg*, 6 Nev. 136; *Rearce* v. *Hitchcock*, 2 N. Y. 388; *Ostrander* v. *Walter*, 2 Hill, 329.

The sheriff or defendant, in the replevin suit, is the real party in interest, unless, by statute, the execution creditor is expressly made so.

The verdict and judgment in the replevin suit are not such as fix the liability of the sureties on the undertaking. Civ. Prac. Act 1867, § 177; Thomp. on Prov. Rem. 36, 165, 166; *Nickerson* v. *Chatterton*, 7 Cal. 568; *Clary* v. *Rolland*, 24 id. 147; *Dorsey* v. *Manlove*, 14 id. 555; *Gallarati* v. *Orser*, 27 N. Y. 324.

Appellants should have been permitted to show the extent and value of the interest of Kintzing in the property. Sedg. on Dam. 582, 583; Thomp. on Prov. Rem. 165; Civ. Prac. Act, title Claim and Delivery; *Wheeler* v. *McFarland*, 10 Wend. 322; *Dodge* v. *Wilbur*, 10 N. Y. 580; *Cresson* v. *Stout*, 17 Johns. 116; *Russell* v. *Butterfield*, 21 Wend. 300.

A writ of *retorno habendo* should have been issued and returned in the replevin suit. Civ. Prac. Act 1867, § 210, 134; Thomp. on Prov. Rem. 38, 167.

There should have been a demand for the property Respondent should have given an indemnity bond to the sheriff, and retained the property, in order to have any rights therein. *Skinner* v. *Stuart*, 24 How. Pr. 489; *Davidson* v. *Dallas*, 8 Cal. 227.

The complaint and answer in the replevin suit, fix the value of the property at $2,500, and the undertaking therein

is for that sum. The court erred in admitting evidence, and allowing the jury to fix such value at double such sum. Drake on Attach. 309, 310, 327, 342; *Farley* v. *Bryant*, 34 Mo. 489.

If evidence of the value of the property was admissible, it should be fixed at the time the property was replevied, or the execution came to the sheriff.

The suit abated, so far as C. S. Kintzing was concerned, after filing his plea and proofs in bankruptcy. Further proceedings were void as to him and his bondsmen, *pro tanto*. See Bankrupt Act, March 2, 1867.

The court erred in giving respondent's instructions, and refusing those of appellants'. The case was tried upon the wrong theory. If respondent could recover at all, the $2,500 fixed by the bond, answer and complaint in the replevin suit should be credited by $1,300, realized by respondent out of goods sold or execution, being part of the goods so replevied.

CHUMASERO & CHADWICK, for respondent.

Under the Civil Practice Act, the action must be brought in the name of the party injured by the replevin suit, and entitled to the fruits of a recovery, upon the undertaking executed in the case, regardless of the nominal obligee. Respondent is the real party in interest in this case. The bond was not given for the benefit of the sheriff. The object of the undertaking sued on was to insure the return of the property to the respondent, or the payment of its value in case of its non-return. The sheriff attaches property, as trustee, for the benefit of the plaintiff. The character of the interest is not changed, if the property is replevied. The sheriff cannot be regarded as the real party in interest. No assignment of the bond was necessary to enable respondent to sue. *Baker* v. *Bartol*, 7 Cal. 551; *Summers* v. *Farish*, 10 id. 351; *Bridge* v. *Niagara I. Co.*, 1 Hall, 247; *Arnold* v. *Lyman*, 17 Mass. 400; *Jackson* v. *Mayo*, 11 id. 147; *Wormouth* v. *Hatch*, 33 Cal. 121.

The complaint alleges that the undertaking was delivered to respondent. This was a sufficient assignment under our

act. No formality is necessary to transfer a chose in action. A debt may be assigned by parol as well as by writing. 2 Story's Eq. 311; *Hinkle* v. *Wanger*, 17 How. (U. S.) 368; *Slaughter* v. *Faust*, 4 Blackf. 380; *Briggs* v. *Dorr*, 19 Johns. 95. A bond may be assigned orally by delivery. *Ford* v. *Stuart*, 19 Johns. 342; *Dawson* v. *Cole*, 16 id. 51.

The action was properly brought on the bond, although the judgment was not in the alternative. *Whitney* v. *Rehmer*, 26 Ind. 503.

Appellants could not show title to the property in any other person than the defendant in the attachment suit. *Mitchell* v. *Ingram*, 38 Ala. 395; *Smith* v. *Lisher*, 22 Ind. 500; *Williams* v. *Vail*, 9 Mich. 162; *Gray* v. *McLean*, 17 Ill. 404.

The alleged bankruptcy of Kintzing was no defense in this action. *Flagg* v. *Tyler*, 6 Mass. 32.

No writ *de retorno* or demand was necessary before this suit was commenced. *Perreau* v. *Bevan*, 8 D. & R. 72; Saunders' Pl. 770; *Nickerson* v. *Chatterton*, 7 Cal. 573; *Livingston* v. *Hammer*, 7 Bosw. 671; *Ormsbee* v. *Davis*, 16 Conn. 578; *Peck* v. *Wilson*, 22 Ill. 206.

The value of the property must be found from the evidence. The complaint and answer in the replevin case do not show the true value. The respondent was entitled to prove and recover the actual damages sustained.

E. W. TOOLE and SHOBER & LOWRY, for appellants, in reply.

The cases cited by respondent are those where the bond is given to the sheriff for the use of the defendant. The sheriff claimed a special property in this suit, and the bond was delivered to the coroner for his benefit.

The bondsmen contract with reference to *res adjudicata*, so far as principal is concerned. In this case there has been no *res adjudicata* with reference to the value so as to bind the principal. No opportunity to try the value of special property of sheriff or Kintzing has ever been afforded Watson, and comes for first time on suit against sureties.

KNOWLES, J. This cause comes to this court on appeal from the third judicial district. The record presents the following facts: Lomme commenced an action to recover a debt against B. C. and Charles S. Kintzing for the sum of $4,384.89, and interest thereon. As auxiliary to this action for the purpose of securing any judgment he might obtain therein, he procured the issuance of a writ of attachment which the sheriff, W. K. Roberts, levied upon certain property as belonging to the Kintzings. Afterward, W. S. Watson brought an action of replevin against Roberts and came into possession of this property. In this action John M. Sweeney and Anton M. Holter entered into an undertaking in the sum of $5,000 to Roberts, conditioned that the said Watson should return the said property to him if a return should be adjudged, and that he would pay any sum of money as might for any cause in said action be recovered against him.

In the case of Lomme against the Kintzings, Lomme recovered a judgment for the sum of $4,954.93, and $552.50 costs. In the action of Watson against Roberts, Roberts recovered judgment against Watson. The verdict of the jury in that case was as follows: "We, the jury in the above-entitled cause, find for defendant." Upon this verdict the court adjudged that the defendant, Roberts, was entitled to a return of the property. No demand was made of Watson for a return of said property on behalf of Roberts; nor was there any writ issued by the court for the purpose of taking possession thereof and returning it to Roberts. There was no assignment of the undertaking executed by Sweeney and Holter to Lomme. The same was delivered to him, however, by Roberts, and he brings this action in his individual name. It may be proper to remark that the bill of exceptions in this case is presented to the court in an imperfect condition, and not as prescribed by law. The record does not clearly point out the alleged errors of which the appellant complains.

As the respondents, however, make no objection to the record, we will consider the imperfections as waived.

The first question we are called upon to determine is, as to whether or not Lomme had any right to bring this action in his own name; whether or not he is the proper party plaintiff therein. The undertaking was made payable to Roberts. In what capacity did he hold the goods taken from him by Watson? He held them as an officer, for the purpose of preserving the lien which had been created therein in favor of Lomme by virtue of the writ of attachment in his suit against the Kintzings, and also that they might be made subject to the satisfaction of any execution Lomme might procure to be issued against those parties in this action against them. He, likewise, held them for the purpose of returning them to the Kintzings, should Lomme fail to recover judgment against them. It will be observed from this that Roberts had but a special property in these goods. He held them for the benefit of others. His position was analogous to that of a receiver. "A trustee is a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." Hill. on Trust. 65.

Lomme had, perhaps, no estate in these goods, but Roberts was exercising a power over them for his benefit, and hence was his trustee. A trustee can maintain an action for any damage to property he may hold in trust, and the amount of damages he may recover will be commensurate with the damages done to his *cestui que trust* and to his individual interest. At law the trustee is considered as holding all the title or interest of his *cestui que trust*. A stranger would not be allowed to set up an outstanding equity of a *cestui que trust* for the purpose of lessening a trustee's damages to the property he holds. The undertaking was then given to secure all damages which Roberts might sustain by a failure to return the goods to him, should the court so adjudge, whether those damages should accrue to him in his individual or representative capacity. Lomme had a right to have these goods in Robert's hands in order that they might be taken under execution to be sold to satisfy any judgment he might obtain against the Kintz-

ings. The fact, however, that they were taken on legal process from the possession of Roberts would be a sufficient legal excuse for not being able to produce the goods. The only thing Roberts might have been liable for would have been negligence in exacting proper security from Watson, for a sheriff is only liable for negligence in such cases. Lomme was really the person, then, who was damaged by a failure of Watson to return the goods, and the undertaking was given to secure him in his rights concerning the goods. Roberts occupied the position of a trustee of an express trust in receiving the undertaking from appellants. A trustee of an express trust is defined to be, in our statute, a person with whom, or in whose name, a contract is made for the benefit of another. See Laws of 1867, 136, § 6.

The utmost extent of signification is to be attributed to this term "trustee of an express trust." 1 Whit. Pr. 63.

The case of a trustee of an express trust is an exception to the rule, that every action must be prosecuted in the name of the real party in interest.

"The fact, however, that the trustee of an express trust might bring an action in his own name does not, in most instances, preclude the beneficiary or real party in interest from likewise bringing suit in his name, and the instance of a party for whose benefit a contract was made is a case in which this may be done." See 1 Whit. Pr. 64; *The Camden Bank* v. *Rogers*, 4 How. 63; *Lane* v. *The Columbus Insurance Co.*, 2 C. R. 65; *Baker* v. *Bartol*, 7 Cal. 557: *Tauffe* v. *Rosenthal*, id. 514.

For these reasons we consider Lomme a proper party plaintiff.

The second question presented is, the liability of the defendants under the judgment entered in favor of Roberts and against Watson. It is claimed that because Roberts obtained against Watson no alternative judgment for the value of the property in case a return could not be had, that these defendants are not liable on their undertaking. That they made themselves liable on their undertaking only to make good such judgment as Roberts might lawfully obtain

against Watson ; and that the only legal judgment Roberts could obtain against Watson was for a return of the property, or its value in case a return could not be had. Now we hold that a judgment for a return of the property was not a void judgment, but at the worst an irregular one. An irregular judgment is not an illegal or unlawful one. *Johnston* v. *Comley*, 10 N. Y. 570 ; *Ingersoll* v. *Bostwick*, 22 id. 425.

An irregular judgment will support an execution and may be enforced. *Rawley* v. *Howard*, 23 Cal. 401.

It is not true, however, that the law in regard to the judgment which a party may recover, in an action of replevin, enters into and forms a part of the contract which sureties enter into in an undertaking in such an action, so as to vary the same. Sureties in such an undertaking are bound by the contract they sign. Their liability cannot be extended or made less by any such statute. The conditions of such an undertaking are prescribed by law. It is not claimed that the undertaking sued upon is not in all particulars in conformity to the statute. This is what the defendants undertook for Watson :

" For the prosecution of such action, for the return of the said property, if return thereof be adjudged, and for the payment to the said defendant of such sums as may from any cause be recovered against the said plaintiff."

This is not an alternative undertaking. The defendants did not contract in this undertaking that Watson should return the property if the same should be adjudged, or they would pay the value thereof. They contracted both that Watson should return the property if it should be so adjudged, and pay any judgment the defendant in that action might recover for any cause for money against him. If the plaintiff in that action failed to perform any one of the things the sureties had undertaken that he should, the sureties became liable on their undertaking to the extent of the damages suffered for such cause. A judgment for the return of the property was awarded, and the property not returned.

The cases of *Nickerson* v. *Chatterton*, 7 Cal. 568, and *Clary v. Rolland*, 24 id. 147, cited by the appellants, maintain a different opinion from that here expressed. The latter case, however, while following the former upon the doctrine of *stare decisis*, holds the following language:

"If we were called upon to construe the sections as an original question, unaffected by any prior decision upon the same point, we might be disposed to hold the complaint sufficient in this respect. Such was our impression upon the argument, but upon a careful examination of the decisions of the supreme court referred to in the argument, we find that the point has been determined the other way."

The point in that case was raised by demurrer, alleging that the complaint did not state facts sufficient to constitute a cause of action, for the reason that the complaint did not show a judgment in the alternative either for a return of the property or its value.

This language has the effect to destroy certainly the authority of the case of *Nickerson* v. *Chatterton* to a considerable extent. That court, after a mature consideration, evidently does not approve of the principle laid down in that case, and are forced to approve of it for different reasons. In direct opposition to the case of *Nickerson* v. *Chatterton*, is that of *Whitney et al.* v. *Lehmer et al.*, 26 Ind. 504. The principle upon which this case is decided is evidently that the practice in an action of replevin, as to the verdict and judgment that may be entered therein, does not affect the liability of the sureties in an undertaking in that action. That their liability is fixed by their undertaking and for a breach of it those entering into the same were liable.

The case of *Gallarati* v. *Orser*, 27 N. Y. 324, it is claimed, announces a rule in accordance with that of *Nickerson* v *Chatterton*, and adverse to that expressed by this court.

The judgment considered in that case was for the value of the property only, and for that reason it was held that the sureties liable on an undertaking in arrest were not held. We are not prepared to say that this ruling was not correct.

The sheriff, for having discharged a defendant from arrest without sufficient bail, was held to be liable, as sureties had they been given would have been. One of the provisions of an undertaking in such a case is the same as required in an undertaking in replevin. The sureties were required by the law to undertake that the defendant would produce the property and pay the plaintiff such sum as might for any cause be adjudged against him. Under such a clause as the last, it was claimed that the sureties would be held liable when the judgment was for the value of the property only. The court, however, held otherwise. There is reason for holding that the provisions of the statute, in relation to the judgment for money that should be entered in replevin, may be considered as explaining this clause of an undertaking, and that sureties undertake only to pay such judgment as should be properly adjudged, and that a proper judgment was an alternative one for the value in case a return could not be had. In such a case it might be claimed that the judgment, not being in the alternative, did vary the contract of the sureties. This view of this question, however, is not free from doubt. In that case one of the judges dissented from the opinion of the court, and held that the judgment was only an irregular one, and that sureties were held on an irregular judgment the same as their principal. And in direct conflict with that opinion is the case of *Mason* v. *Richards et al.*, 12 Iowa, 73. The court in that case held that the judgment for the value of the property only was irregular, and erroneous but not void. That such a judgment could be enforced against the principal, and that the sureties were not released, but liable.

The defendants in this action, however, insist that our statutes upon the subject of the recovery of personal property were borrowed from California, and that we are bound by the construction put upon them by the courts of that State. The statutes in question substantially existed in a great many States of this Union besides California at the time our legislative assembly adopted it. California borrowed it from New York. The correct appellation for our

practice is the New York Code practice, and not the California Code practice, and as the New York courts had not fully determined this precise point when our legislative assembly adopted its Code, we should consider ourselves free to determine this question upon principle, and not upon authority. The defense of the bankruptcy of C. S. Kintzing, set up by defendants in this action, we think wholly untenable. That defense was set up by Kintzing in the action of *Lomme* v. *B. C. and C. S. Kintzing.* The plaintiff alleges in his complaint in this action that he recovered judgment against the Kintzings for $4,954.93 in that action, and this averment is not denied by the answer of defendants.

If that judgment was erroneous it cannot be attacked in this action. It is not a void judgment, and hence cannot be reviewed in a collateral action. In relation to the right to the possession of the property, that was considered and decided in the action between Watson and Roberts. If C. S. Kintzing had become a bankrupt, his assignee in bankruptcy might be entitled to the possession of the property, but that is no reason why Watson should be entitled to take the property from Roberts and hold the same. He claimed the right to the possession through the Kintzings himself, and not under C. S. Kintzing's assignee. We hold that the sureties on the replevin undertaking had no right to introduce evidence in this action of the interest of the Kintzings in the property replevied. The answer denies that the Kintzings had any interest in property that was the subject of the attachment, but there is no regular allegation of ownership in any one else. There is no plea of this kind set up by way of defense such as would be required in order to entitle the defendant to prove the same.

Again, where the question of who is the actual owner of property is in dispute, we do not think that the defendants in an action on an undertaking in replevin can set up title in a stranger, and in that action compel the plaintiff to litigate his title to the property, upon which there had been a determination between the plaintiff and the principal, for whom the sureties became liable.

As appears from the record in the action of replevin, Watson claimed to be the owner of the property in dispute, and alleged that he derived title by purchase from the Kintzings. It does not appear in this case from the exceptions taken who the defendants claimed was the owner of the property. If it was the assignee of C. S. Kintzing in bankruptcy, then the court could have very properly have held that partnership property must first go to the liquidation of partnership debts, and that until these were litigated the property could not pass to his assignee.

It was not necessary for the plaintiff to have a writ *retorno habendo* issued and returned unsatisfied before he could bring this action. The sureties undertook that Watson should return the property if a return thereof should be adjudged. A return was adjudged and Watson failed to return the property. This was a breach of the undertaking. The case of *Nickerson* v. *Chatterton* decides that no writ *retorno habendo* was necessary in order to fix liability of the sureties, and that case may be considered as very favorable to sureties.

It is claimed by appellants that if plaintiff is entitled to recover he is only entitled to recover damages to the amount of the value of the property as specified in the complaint of Watson in his action of replevin. In a complaint in an action of replevin the plaintiff states the facts which entitle him to a judgment. If he wishes a judgment for the value of the property in case the possession of the same is not delivered to him, he must allege its value. This is the basis of his right to recover such a judgment, but to hold that because the defendant, in an action of replevin, does not, in his answer, not only confess the value of the property which the plaintiff has fixed upon it, but allege that it is of much greater value, that he is bound by this allegation of the plaintiff, and cannot prove the actual value of the property taken in an action on the undertaking, would be imposing upon him great hardship surely. It is doubtful if the defendant in an action of replevin could base his right to a judgment for the value of the property, without alleging

the value of the same in the answer. The answer of a defendant in an action of replevin claiming a return of property, or in case that cannot be had, a judgment in the alternative for its value, is in the nature of a cross complaint, and must state facts sufficient to warrant the court in giving the relief demanded. See 8 Cal.

In no case can the allegations of the complaint be a basis to warrant the affirmative relief prayed for by the defendant. Of course, where the allegations of the complaint have been denied by the answer, and the plaintiff fails to make out his case, the judgment of the court would be for a return of the property.

There are cases to the effect, that where the court awards a judgment of nonsuit the defendant is not entitled to an alternative judgment for the value of the property. If the rule, however, contended for was the correct one, why the value of the property alleged in the complaint would not be a basis for an alternative judgment, we are unable to perceive where a nonsuit was adjudged. It was not necessary that the plaintiff should have made any demand for a return of the property. The only object of making a demand is to notify the party in possession of the property of the rights and claim of the person entitled to the property. Of this the principal and his sureties had ample notice in the action of replevin. The plaintiff in that action set up his rights, and claimed a return of the property, and judgment of return was awarded him, and that certainly was sufficient notice.

For these reasons the judgment of the court is affirmed.

Judgment affirmed.

KINNA, appellant, *v.* HORN et al., respondents.

PRACTICE — *verdict — conflicting evidence.* The verdict of a jury will not be disturbed if there is a conflict in the evidence upon the material issues in the case.

PRACTICE — *new trial—irregularities.* A new trial will not be granted on the ground of irregularities in the conduct of a party and his attorney during the trial, if it does not appear that the verdict was affected by the irregularities.

Appeal from the Third District, Lewis and Clarke County.

THIS case was before the court in January, 1871, *ante*, 329. The second trial in August, 1871, resulted in a verdict and judgment for defendant, Horn. In December, 1871, the court, WADE, J., overruled Kinna's motion for a new trial and Kinna appealed.

Kinna filed three affidavits in support of the ground of irregularities in the conduct of Horn and one of his attorneys during the trial. They set forth that Horn testified on incompetent subjects in defiance of the rulings of the court; that Horn testified that plaintiff was a "liar" and "thief," and repeated the same and other vile epithets in the presence and hearing of the jury; that Horn made use of the same epithets concerning a witness for plaintiff; and that Horn was excited and could not be controlled by the court.

They also set forth that Horn admitted that Marvin, a witness for Kinna, would testify to the facts recited in Kinna's affidavit for a continuance; that one of Horn's attorneys said to the jury in his argument that this affidavit was not the testimony of Marvin, and that he did not believe that Marvin would swear to what was contained in the affidavit for a continuance; and that one of Horn's attorneys said in the hearing and presence of the jury that certain goods had not been delivered, although the court repeatedly ruled that evidence of such facts was incompetent and irrelevant.

W. F. SANDERS, for appellant.

The record shows that appellant maintained his case by a clear preponderance of proof. This court should enforce the law, which declares those facts sufficiently proven, which are thus maintained. The verdict was against the weight of the evidence and should be set aside.

The judgment should be set aside on account of the irregularities. There will be no orderly trials if such performances as appear in this case are not visited with penalties in the form sought. This court should put an end to "sharp" efforts to win cases in defiance of law. No counter affidavits were filed by Horn, and the only proof to be heard concerning these irregularities is in the affidavits filed by Kinna.

The testimony shows that this is an extraordinary case, in which the verdict should be set aside. The court abdicates its functions if it permits the jury to act like an irresponsible mob.

SHOBER & LOWRY, and E. W. TOOLE and R. H. WILLIAMS, for respondent Horn.

Appellate courts have generally held that they would only interfere in extraordinary cases with the decisions of lower courts in relation to the weight of evidence. The appellate court will not disturb a judgment or verdict where there is a substantial conflict in the testimony and no rule of law has been violated. *Ming* v. *Truett*, *ante*, 322; *Lubeck* v. *Bullock*, 24 Cal. 338; *Ellis* v. *Jeans*, 26 id. 275; *Wilkinson* v. *Parrott*, 32 id. 102.

No instructions appear in the transcript, and the only question for review is this: Was the verdict warranted by the evidence?

KNOWLES, J. This cause presents but two points. There was a full traverse of the complaint of plaintiffs by the answer of the defendant Horn. Upon the material issues in the case there was a conflict of testimony. This court has repeatedly held, in accordance with the well-established

precedents of other courts, that where there is a conflict in the testimony upon the material points in issue in the cause, it cannot disturb the verdict of a jury. That it cannot invade the province of the court below and of the jury, and determine the credit to be given the witnesses, and as to whether injustice was done.

The other point is the irregularities occurring during the trial complained of in the affidavits filed by the appellants. There was no exception duly authenticated taken as to any action of the court below, or the jury. The conduct complained of is that of the defendant Horn and one of his attorneys. It does not appear in any manner that these irregularities affected the conduct of the jury, and this court cannot presume that they did. The granting of a motion for a new trial rests in the sound legal discretion of the court that tried the cause. The judge of that court was acquainted with the facts of the case and was better able to determine the effect of the irregularities specified in the affidavits of appellants than this court. And in the overruling of the motion for a new trial we can see no abuse of discretion. We find no other points presented in the case that demands our consideration.

Judgment of the court below affirmed.

Judgment affirmed.

SANDERS, appellant. *v.* FARWELL, respondent.

DISTRICT COURT—*jurisdiction*. The district courts of the Territory, created by congress, are not courts of the United States.

DISTRICT COURT—*equity—citizenship of parties*. The district courts of the Territory, exercising the jurisdiction of the circuit courts of the United States, have no jurisdiction of a suit in equity between citizens of the Territory.

DISTRICT COURT—*equity*—The district courts of the United States have no jurisdiction to determine equity causes.

JURISDICTION—*consent of parties*. The consent of parties cannot confer upon a court jurisdiction, which is not granted by law.

PRACTICE—*demurrer—waiver of service*. The filing of a general demurrer to a bill in equity is a waiver of any irregularity in the service of the subpœna.

Appeal from the First District, Madison County.

THE demurrer of Farwell to the bill of Sanders was sustained by the court, MURPHY, J., in April, 1872, and Sanders appealed. The facts are stated in the opinion.

E. W. TOOLE, for appellant.

The district courts have jurisdiction of the subject-matter. Respondent appeared by demurrer, and that gave the court jurisdiction of his person.

If the process was improper, it will be set aside or quashed, and new and proper process could be invoked. If the service was by the wrong officer, the writ could have been served by the proper officer thereafter, and a motion limited to setting aside the service would have been proper. But neither defects in the writ, or its service, can be raised by demurrer, for a demurrer is an answer in law to the bill.

The bill of complaint was proper, the process was regular, the service was by the proper officer, and the jurisdiction was complete. Rules U. S. Sup. Ct. in Eq. 7, 15, 96; Organic Act, § 9; *Orchard* v. *Hughes*, 1 Wall. (U. S.) 76; *Dunphy* v. *Kleinschmidt*, 11 id. 610.

H. N. BLAKE, for respondent.

The district court, sitting as a district court of the United States, has no jurisdiction of this case. The two jurisdictions are distinct, and must be kept separate. In certain cases, the legislative assembly has conferred jurisdiction on these courts; in other cases, congress has regulated the jurisdiction. If congress has not given the district courts of the United States jurisdiction in this action, the court below properly sustained the demurrer. Section 9 of the "Judiciary Act," 1 U. S. Stat. 73, and other acts, regulate this jurisdiction. With the exception of the act of May 15, 1820, 3 U. S. Stat. 592, the district court of the United States has no equity jurisdiction. This exception is inapplicable to this case. Conkling's Treatise (5th ed.), 263, § 4; *Parker* v. *Judges*, 12 Wheat. 561; 1 Abb. U. S. Prac. 243, 288; *Stacy* v. *Abbott*, 1 Law Times, 84.

The circuit courts of the United States possess jurisdiction of suits of a civil nature in equity. Appellant did not commence his action in this court. He could not do so, because he is a citizen of Montana Territory. A citizen of a Territory cannot maintain a suit in the circuit court of the United States. *New Orleans* v. *Winter*, 1 Wheat. 91; 1 U. S. Stat. 73, § 11.

The jurisdiction of this action is in the district court, created by the organic act. Acts 1865, tit. 18.

The rules of the supreme court of the United States relate to the practice in the circuit court, in which appellant cannot sue. They do not apply to this case. *Clinton* v. *Englebrecht*, 13 Wall. 434.

Respondent did not make a general appearance by demurrer. An appearance, for the purpose of denying the jurisdiction of the court, could not be held to be an admission of the jurisdiction. The defect is not thereby waived. *Wheeler* v. *Lampman*, 14 Johns. 481; *Malcolm* v. *Rodgers*, 1 Cow. 1; *Williams* v. *Keller*, 6 Nev. 145.

KNOWLES, J. It appears by the bill of exceptions presented in this case, that the appellant filed his bill for the foreclosure of a vendor's lien "in the office of the clerk of the district court of the United States in and for the first judicial district of the Territory of Montana." That afterward, in pursuance of the prayer of the bill, a writ of subpœna, issued out of said court, directed to the respondent, Don C. Farwell, commanding him to personally appear before the judge of the district court of the United States of America for the first judicial district of the Territory of Montana, within ten days to answer a bill of complaint exhibited against him in said court. This subpœna was duly served and returned by the United States marshal for Montana Territory. The respondent appeared in this action and demurred to the bill on the two following grounds:

"First. That said court hath not jurisdiction of the person of the defendant.

"Second. That the said court hath not jurisdiction of the subject of the action."

In the first place there are no such courts in Montana Territory as "the district court of the United States in and for the first judicial district of the Territory of Montana." The district courts for the Territory have conferred upon them the same jurisdiction by our organic act as is exercised by the circuit and district courts of the United States. Yet this does not make them courts entitled to that appellation.

In the case of *Peter Clinton et al.* v. *Paul Englebrecht et al.*, the supreme court of the United States says: "The judges of the supreme courts of the Territory are appointed by the president under the act of congress, but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in the *American Insurance Company* v. *Carter*, 1 Pet. 546, and in the later case of *Benner* v. *Porter*, 9 How. 235. There is nothing in the constitution which would prevent congress from conferring the jurisdiction which they exercise if the judges were elected by the people of the Territory and commissioned by the governor. They might be clothed by the same authority to decide all cases arising under the constitution and laws of the United States subject to the same revision."

Again: "There is no supreme court of the United States, in the sense of the constitution, in the Territory of Utah."

This decision no longer leaves it an open question as to whether this bill was addressed to any court having an existence in this Territory. In the next place, allowing that the intention of the appellant was to appeal to the jurisdiction conferred upon the district courts of the Territory coinciding with that exercised by the district and circuit courts of the United States, the question presented is, was the demurrer well taken?

It will be seen by reference to Brightley's Digest, 126–130, that the circuit court of the United States has jurisdiction "of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a

party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

Also, that it has jurisdiction of certain cases in law or equity arising under the revenue laws of the United States. The bill shows upon its face that both appellant and respondent are citizens of Montana Territory, and the action is to procure a vendor's lien. This shows conclusively that the district court, exercising the jurisdiction of the circuit court of the United States, would have no jurisdiction of the action. It does not come within the enumerated class of actions over which that court, by law, is authorized to exercise jurisdiction.

By a reference to pages 230, 231 of Brightley's Digest, it will be seen what jurisdiction congress has conferred upon the district courts of the United States. The power to determine actions in equity is not conferred. Neither the circuit or district courts of the United States have any jurisdiction but what is conferred upon them by congress. This is an action in equity. The appearance of the defendant did not confer jurisdiction upon the court. The right to determine the action presented in the bill, if not conferred by law, could not be conferred upon the court by consent of parties. Hence, we hold that the demurrer was well taken, and the ruling of the court below should be sustained. If this could be treated as an action in the district court for the Territory, exercising its powers as a territorial court, there is no doubt but that the appearance of the defendant in the action and the filing of a general demurrer to the bill would be a waiver of the irregularity of the service of the subpœna by the United States marshal. We do not think, however, that this should be so treated. The court in which the bill purports to be filed, the prayer for a subpœna and the service of the same by the United States marshal for the Territory, precluded the idea that there was any intention, on the part of the appellant, to commence his action in this court, and appeal to what is commonly termed its territorial jurisdiction.

For these reasons the judgment of the court below is

Affirmed.

FIRST NATIONAL BANK OF HELENA, respondent, *v.* How et al., appellants.

PROMISSORY NOTE—*consideration—fraud—defense.* Fraud that impeaches the consideration of a promissory note constitutes a defense to an action at law on the note.

PROMISSORY NOTE—*fraud of maker and payee—vendor and vendee—defense.* A party who buys and receives from the possessor quartz-mill machinery, the title to which is in litigation, and makes his promissory note in payment of the same, commits a fraud on the vendor by delivering the possession of the property and executing a conveyance of his right thereto to another claiming the same, upon a demand without any legal compulsion, and cannot afterward plead as a defense, in an action brought on the note, the fraudulent conduct of the vendor in selling the property.

PROMISSORY NOTE—*failure of consideration—delivery of property.* In an action to recover a promissory note, the maker does not show a failure of consideration by alleging that the payee had no title to the property, in payment of which it was made, if it appears that the maker had delivered to a claimant, without any legal necessity, the property which he had bought and received from the payee.

PROMISSORY NOTE—*pleading—allegation of fraud.* In an action on a promissory note the allegation that a suit was corruptly and fraudulently dismissed, without setting forth the facts constituting the fraud, is immaterial.

PLEADING—*filing amended answer—discretion.* It is not an abuse of legal discretion in the court below to refuse to allow a defendant to file a second amended answer, if the affidavits do not show what the defense is, and why it was not made before.

Appeal from the First District, Madison County.

IN April, 1872, the court, MURPHY, J., sustained the motion of plaintiff for judgment on the pleading, and refused to allow the defendants, How *et al.*, to file another amended answer.

The answer alleged that the only consideration of the note sued on was the sale and delivery to How of certain machinery; that plaintiff, at the time of the execution and delivery of the note, falsely and fraudulently stated and represented to How that the plaintiff was the legal and rightful owner of the property, and had the full right to sell the same; that How, relying on these representations, executed the note sued on; that the only title of plaintiff to

the property, at the time of the execution of the note, was derived by a pretended sale and delivery of the property to plaintiff by Cole Sanders, who had possession of the same as agent of the "Cole Sanders Mining Company;' that said Sanders had no right to so sell and deliver the property, which belonged solely to the company, and was employed by the company as its agent in putting up said machinery and using the same in quartz milling; that plaintiff well knew the foregoing facts; that Sanders became indebted individually to plaintiff, for purposes not embraced within his employment as such agent; that plaintiff fraudulently colluded to defraud the said company of said property, and that said Sanders, with fraudulent design, and without any power or authority, sold and delivered said property to plaintiff in consideration of said individual indebtedness; that plaintiff commenced an action against said company to procure the title of the company to the property, and agreed to prosecute the same to judgment; that How relied upon such prosecution, and that said note would not have been made if plaintiff had not made this inducement; that plaintiff, after the execution of the note, wrongfully and fraudulently dismissed said action, and has failed to procure any adjudication of the title to said property, as against said company; that plaintiff procured the execution of said note to defraud the defendants of the moneys mentioned in the note; "and defendants aver that the said Cole Sanders Mining Company, by virtue of their said superior title, has demanded and claimed possession of said property from defendant How."

The answer contained a counter-claim, and demanded judgment against plaintiff for $8,000 damages sustained by defendant How in the transportation and erection of said property for the purpose of crushing quartz.

The other facts appear in the opinion.

W. F. SANDERS and S. WORD, for appellants.

The court below seems to have thought that the answer stated facts that constituted a defense in equity, but not in

law. The question in this case is, whether the law will enforce a contract procured by fraud, or compel the specific performance of an executory agreement when the consideration has wholly failed. Chitty on Cont. 748, tit. "Contracts void on the ground of fraud."

The appellant How, who had no title, quit-claimed to the party having the superior title. It is contended that this is an admission, which does away with the force of the allegations as to fraud in procuring the note, and failure of consideration. There should be no confusion here. Suppose the plaintiff had come in and confessed the fraud and failure of consideration set forth in the answer, and had alleged, by way of avoidance, that How had yielded to the superior title and quit-claimed his interest as stated in the answer, would any court hold that the matter confessed had been avoided? Certainly not. The fact that this allegation is made by the defendants in the answer is of no more force than if made as reply by plaintiff.

No interest should have been allowed on the note. Respondents "charged" interest at more than ten per cent per annum. Such charging results in a forfeiture of all interest due. Act June 30, 1864, § 30; 2 Bright. Dig. 64; *National E. B. Columbus* v. *Moore*, 1 Law T. Bank, 74.

E. W. & J. K. TOOLE, for respondent.

The answer shows that the defense, if any, is equitable. Appellants' remedy should be by a bill asking a stay of proceedings in a court of chancery.

Appellants had no right to dispose of the property to the Cole Sanders Mining Company. Appellants should have returned property to respondent upon discovery of the alleged fraud. The title of respondent has been vested in the Cole Sanders Mining Company by the conveyance of How. Respondent must look to appellants and the note sued on, and has no other remedy.

The court properly denied the application of appellants to file an amended answer. The answer on file was a second amended answer. The affidavits do not show what amend

ments are sought to be made. Appellants must show that they would obviate the objections to the answer on file by their proposed amendments. Appellants must also show that there was a gross abuse of discretion by the court below in refusing to permit them to amend their answer. How many times has a party a right to amend? Can a party gamble for decisions of the court, and continue to ask to amend if the rulings are adverse to him?

KNOWLES, J. The only points presented in this case are the sufficiency of the answer of the defendants, and the refusal of the court below to permit the defendants to file an additional amended answer.

The defendants admit the execution of the note sued, and deny that John S. Atchison, cashier, assigned, for a valuable consideration, this note to plaintiff, or delivered the same to it. This denial would, perhaps, be sufficient to raise an issue as to whether the assignment was for a valuable consideration. The defendants, however, in another part of their answer, aver that they "executed and delivered to the said John S. Atchison, as cashier and agent of plaintiff, and for the sole use and benefit of plaintiff, the said promissory note sued on." Admitting this averment to be true, and the plaintiff is the rightful owner of the note, and under our statute the proper party plaintiff, although the assignment of the note to plaintiff may not have been for a valuable consideration.

We come now to the consideration of whether the answer sets up other facts which constitute a defense to the action on the said note.

Both plaintiff and defendants seem disposed to treat, in their arguments, the allegations of the answer as setting up the defense of fraud. We do not feel disposed to enter into the discussion as to whether this defense is an equitable one or not, and, therefore, inadmissible, under our organic act, to be interposed to this action on a promissory note. Undoubtedly fraud can be set up as a defense to an action at law on a promissory note, that is, any fraud that would impeach

the consideration for which the note was given. The fraud presented in this case by the answer of the defendants is, that the plaintiff sold the defendant How certain quartz mill machinery, for which, as a security for the payment of the consideration, this note was given, but that plaintiff had no title to said property. That the same was owned by a corporation known as the Cole Sanders Mining Company, incorporated under the laws of the State of Missouri. That plaintiff purchased this property from Cole Sanders, an agent of the said corporation, and that he had no authority to sell the same. That at the time of the sale plaintiff knew that it had no title to said property, and that the said Cole Sanders had no authority to sell the same.

The answer shows that plaintiff agreed to prosecute an action to declare the title to the said property to be in plaintiff, and not in said corporation, and that a suit was pending for that purpose when plaintiff sold defendant How this property, but that plaintiff, disregarding this agreement, fraudulently dismissed said action.

When a party sets up fraud, he must come into court with clean hands and show that he is entitled to avail himself of the fraud alleged. As we have seen, the defendants show by their answer that they had been apprised that there was some dispute about this property, that an action was pending, concerning the same, against the Cole Sanders Mining Company.

The defendants aver "that the Cole Sanders Mining Company, by virtue of their said superior title, has demanded and claimed possession of said property from defendant How, and that said defendant How has released, relinquished and conveyed to said corporation all his title and possession and right of possession of the said property derived under and by virtue of the said sale."

This was not a proper course for the defendant How to have pursued on a simple demand from the Cole Sanders Mining Company, for said property, although that company may have had the best title to the same. The proper action on the part of the defendant How would have been to have delivered

or offered in good faith to deliver back the property to the plaintiff, as soon as he discovered that the plaintiff had no title to said property, and that a fraud had been committed upon him, unless in some manner he was prevented from so doing. He had no right to pursue such a course as to place the plaintiff in a more unfavorable position in regard to the property than he would have been had he never sold the same to him. The mere demand of the Cole Sanders Mining Company was not sufficient to have prevented the defendant How from delivering or offering to deliver the possession of the property back to plaintiff, much less was it sufficient to compel the said How to not only deliver the possession of said property, but to make a conveyance of the same to the said company of his title and interest. Possession of property is of some value. The possessor of property may never be compelled to deliver the same to the one holding the paramount title. The conduct on the part of How we hold was such as will preclude him and his sureties from coming in and setting up the fraud complained of. The said How has committed a wrong against the plaintiff by his conduct in the premises. It may be urged that, as the answer must be taken as true, there was no wrong in the action of the defendant How, because the plaintiff had no title to the property as appears by the answer. The reply to this is that the defendant How, having received the possession of this property from the plaintiff, had no right unless by a legal compulsion to deliver the property to the other contestant therefor. That although the plaintiff may have had no title to the property, it had the possession thereof and How had no right to act in such a manner as to deprive it of regaining this. Such a proceeding as that of the defendant How would be but a short way of taking property from the possession of one claimant and delivering it to another, and then force the one who had been deprived of the possession of the same and the use and enjoyment thereof to litigate the title to the property on an action on the promissory note given as a security for the payment of the consideration therefor. No court would be war-

ranted in supporting such a proceeding. It is inconsistent with fair dealing on the part of the defendant. He must have his hands clean to entitle him to set up the fraud complained of.

It does not appear how the defendants were damaged by a failure to prosecute the suit to test the title to the property between the plaintiff and the Cole Sanders Mining Company. The dismissal of the suit may have been the natural result of the plaintiff parting with the possession of the property and its title to the same. The mere allegation that such dismissal was corruptly and fraudulently done amounts to nothing without showing the fraud. The facts that constitute fraud must be set forth.

It is claimed in the argument of appellants that the allegations of the answer amount to the setting forth of a failure of consideration. We should be more inclined to treat the answer as setting forth such a defense did it not contain the allegations that the plaintiff knew it had no title to said property at the time of the sale of the same, that it purchased the same from an agent of the Cole Sanders Mining Company, who had no authority to sell the same, which the plaintiff well knew.

Treating this answer, however, as an attempt to set up failure of consideration, namely, failure of title of the property for which the note sued on was given in consideration, and does the answer present a complete defense of this kind?

It does not appear that, by any legal action, the plaintiff had been adjudged to have no legal title. It does not appear that the Cole Sanders Mining Company had obtained the possession of said property through any legal process. All that does appear is, that the said mining company demanded possession of one of the defendants, John How, of said property, and that in pursuance of this demand he not only delivered possession thereof to said company, but he conveyed to it all his right, title and interest thereto. We hold that this does not show a failure of consideration. To warrant a party in delivering possession of property . . a

claimant thereof, that he has received possession of from another by virtue of a sale, there must be some legal necessity for him to do so. That he cannot act thus on a simple demand and then claim that the title has failed. It has frequently been held, in cases of the sale of lands, that the defendant, in an action on the consideration therefor, cannot set up a failure of title as a defense to the action without showing an eviction. Personal property comes under the same rule as real estate when a defendant seeks to avail himself of a failure of title. We do not hold, however, that it is actually necessary for a defendant, in such an action, to show an eviction, but we do hold that the title must have failed and that possession can no longer be maintained, or that he has delivered, or offered to deliver, the property back to his vendor, or show some good reason for not doing so. Although the defendants may have been apprised of an outstanding title, and may have believed that this was the paramount title, and, in fact, it may have been, they had no right to deliver possession of the property to this claimant without some legal necessity for it. No such necessity existed at the time and there may never have been such a necessity.

For these reasons we think the answer of the defendants did not state facts sufficient to constitute a defense, and that the plaintiff was entitled to a judgment on the pleadings.

The refusal of the court below to permit the defendant to file an amended answer is assigned as error.

The refusal to allow a party to amend his pleadings rests in the sound legal discretion of the court to whom the application is made, and this court can only review that ruling when it appears that there has been some abuse of that discretion. It appears that the defendants had obtained permission before to amend their answer, and that the answer in this cause was filed in pursuance to that permission.

The attorneys for the defendants make affidavit on their second application to amend their answer, that the defendants, in their judgment, have a good defense to the action, but these affidavits do not show what that defense is, and

why it was not interposed before, although from their affidavits it would appear that such defense must have been within their knowledge.

Under such circumstances we can see no abuse of discretion in refusing to allow this second amendment of defendants to their answer.

For these reasons the judgment of the court below is

Affirmed.

COLLIER, respondent, *v.* FIELD et al., appellants.

RELEASE — *consideration — seal.* A release that is executed for a consideration and does not affect real estate, is valid without a seal.

RELEASE — *judgment — mortgage — release of one obligor.* The written release for a valuable consideration of one of the joint and several makers of a promissory note from all liability on the judgment entered in the district court thereon, and the mortgage securing the payment of the note, satisfies the judgment and releases all the judgment debtors and mortgagors.

RELEASE — *repugnant proviso void.* The proviso in a release of one judgment debtor, which states that the liability of the other judgment debtors shall not be affected thereby, is repugnant to the release and void.

SALE UNDER EXECUTION SET ASIDE — *fraud.* The sale of property under an execution to satisfy a judgment for the foreclosure of a mortgage, after the judgment creditor has released one-half of the property from the mortgage and judgment, and received one-half of the judgment, is fraudulent and must be set aside by the court.

CASE AFFIRMED — *interest.* The case of *Davis* v. *Hendrie*, *ante*, 495, holding that parties could contract for a higher rate of interest than ten per centum per annum after the maturity of the note, affirmed.

PROMISSORY NOTE — *interest until paid.* A promissory note, in which the maker agrees to pay a certain sum, "on or before" a certain day, "with interest at the rate of three per cent per month until paid," does not provide for the rate of interest after its maturity on that day, and the holder can then collect, under the statute, interest at the rate of ten per centum per annum.

Appeal from the First District, Jefferson County.

IN May, 1872, the court, MURPHY, J., overruled the motion of Ervin and Metcalf to set aside the sale of certain property by the sheriff under execution, and they appealed. The facts are stated in the opinion.

PAGE & COLEMAN, for appellants.

Where two or more debtors are jointly and severally bound, a release of one is a release of all. Story on Prom. Notes, § 425; Byles on Bills, § 232; Brightly's Fed. Dig. "Release;" *Nicholson* v. *Reville*, 4 Ad. & El. 675; *Hoffman* v. *Dunlap*, 6 Cal. 183; *Tuckerman* v. *Newhall*, 17 Mass. 581.

Such a release need not be under seal. The rule of the ancient courts in this respect has been changed. 1 Pars. Notes & Bills, 248; *Benjamin* v. *McConnell*, 4 Gilm. (Ill.) 536. Where a consideration is expressed, or proved to have passed, a seal is immaterial. *Ayer* v. *Ashmead*, 31 Conn. 447; *Milliken* v. *Brown*, 1 Rawle, 391.

A general release can be restrained by the recital, which refers to an enumeration of the debts extinguished, never to the parties affected thereby. A proviso in a release that other parties shall not take advantage of it is void. Bacon's Abr., Release, "G;" *Owen* v. *Homan*, 20 L. J.; *Wiggin* v. *Tudor*, 23 Pick. 434; *Rice* v. *Webster*, 18 Ill. 331.

The release extinguishes the obligation, and there must be a new and separate promise to pay to bind the co-obligors. *Stearns* v. *Tappin*, 5 Duer, 244; *Hoosac* v. *Rogers*, 8 Paige, 229.

Equity will not relieve except where there is fraud or unfair practices. *Joy* v. *Warz*, 2 Wash. C. C. 266.

The release in this case cannot be construed a covenant not to sue. No right to bring a suit against all the debtors is reserved in the release. *Bronson* v. *Fitzhugh*, 1 Hill, 185; *Ayer* v. *Ashmead*, 31 Conn. 447.

Parol testimony is inadmissible to contradict or vary the terms of a release under seal. *Bronson* v. *Fitzhugh*, 1 Hill, 185.

In this case the releases are under seal, and the whole debt was extinguished thereby.

The sale should have been set aside on other grounds. The execution was for the amount of the original judgment, whereas the release acknowledged a payment of $1,500. The sheriff was not an officer of the chancery court, and

had no authority to make the sale. The sheriff advertised for sale the property of Field, which had been released.

G. G. SYMES, A. G. P. GEORGE and W. F. SANDERS, for respondent.

There is no appeal from the judgment. Setting aside a sale is in the discretion of the court, and will not be done unless the substantial rights of the parties have been affected. The sale can only be set aside for errors appearing in the record. The evidence heard in the court below was not saved by a bill of exceptions.

A sale of real estate, after the report of sale has been returned and certificate of sale delivered, cannot be set aside except by bill in equity. Mere irregularities and errors in the proceedings of the court will not invalidate a sale. 1 Dan. Ch. 168.

The release only released Field's portion of the debt; it being a several liability, the whole debt is not released. Acts 1865, 454; Story on Prom. Notes, §§ 445, 550.

Our statute makes this a several contract. The release of one on a joint and several contract does not release all, where the contrary is expressly stipulated.

This court cannot reverse the decision of the court below, without hearing the evidence on which the court below based its decision. Injustice would be done by such a ruling.

WADE, C. J. This was an action to foreclose a mortgage, upon certain mining property, situate in Jefferson county, given by defendants to plaintiff, to secure the payment of two certain promissory notes, as follows:

"SPRINGVILLE, *July* 19, 1869.

"On or before the first day of June, 1870, for value received, we jointly or severally promise to pay C. T. Collier, or order, the sum of four hundred dollars, in good bankable gold dust, at eighteen dollars per ounce, with interest at the rate of three per cent per month until paid.

"R. B. FIELD,
"WM. M. ERVIN,
"W. H. METCALF."

"SPRINGVILLE, *July* 19, 1869.

"On or before the first day of August, 1870, for value received, we jointly or severally promise to pay C. T. Collier, or order, the sum of fifteen hundred dollars, in good bankable gold dust, at eighteen dollars per ounce, with interest at the rate of three per cent per month until paid.

"R. B. FIELD,
"WM. M. ERVIN,
"W. H. METCALF."

The defendants were duly notified of the pendency of the action, and made default, whereupon at the October term of the district court for said county, to wit, on the 12th day of October, 1871, a decree was rendered in the action in the usual form, ascertaining the amount due from defendants to the plaintiff, on said notes, to wit, the sum of $3,025.70, and, in default of payment, ordering a sale of the mortgaged premises.

Afterward, on the 8th day of November, 1871, the plaintiff filed with the clerk of said court a release of defendant R. B. Field, as follows.

"I do hereby certify that the sum of $1,528.30 has been paid me by R. B. Field, and for which sum I do release the said Field from all liability on the judgment recovered on the 12th day of October, 1871, and I do further stipulate and agree, that the undivided one-half of the mining ground, mentioned in a certain decree, signed on the 12th day of October, 1871, is also released, and the title now of the same vests in R. B. Field, said decree having been entered in the above-entitled action. But this stipulation does not release any other parties mentioned in the decree, nor any other property mentioned, save and except the undivided half the mining ground.

"C. T. COLLIER."

"Witness: A. G. P. GEORGE."

At the same date, the following release of the mortgage was filed in the recorder's office of Jefferson county, to wit:

"I, C. T. Collier, of Jefferson county, Montana Territory, do hereby certify that a certain mortgage, bearing date the 19th day of July, 1869, made and executed by R. B. Field, Wm. M Ervin and W. H. Metcalf, and recorded in the county recorder's office of Jefferson county, in Book A of mortgages, on pages 187, 188, and filed on the 20th day of July, 1869, has been paid so far as the same relates to R. B Field, and I do hereby consent the same be discharged of record, so far as the undivided one-half of the placer mining claims are *mentioned*, and I do further consent, hereby, to release the said R. B. Field from all further liability on said mortgage, and on the two joint and several promissory notes of even date with said mortgage, and signed by the aforesaid parties who signed said mortgage, and all of the undivided one-half said mining ground designated in said mortgage is fully released, and the title to the same to vest in R. B. Field. But this satisfaction of mortgage is not to release any other parties to said mortgage or notes, or any other property mentioned in said mortgage, save and except the party before named and the property hereinbefore designated.

"In witness hereof I have hereunto set my hand and seal this 8th day of November, A. D. 1871.

"C. T. COLLIER. [L. S.]

"In presence of A. G. P. GEORGE."

Which release was duly acknowledged and recorded in the recorder's office of said Jefferson county.

Afterward, on the 25th day of November, 1871, an order of sale was duly issued for *all* the mining ground mentioned and described in said mortgage and decree, and for the full amount found due upon said notes, no credit having been given on account of the payment of $1,528.30 made by the defendant Field, and on the 27th day of December, 1871, all the mortgaged property was sold by the sheriff, at public sale, to plaintiff Collier for the sum of $3,200, he being the highest and best bidder therefor.

Thereupon, at the May term of said district court, to wit:

On the 13th day of May, 1872, the defendants Ervin and Metcalf filed their motion to set aside the sale made on the 27th day of December, 1871, assigning as cause therefor, among others, the following reasons:

1. The original debt was extinguished before the issuance of the execution or order of sale herein.

2. Before the issuance of said order of sale, these defendants were discharged from the judgment or decree upon which it was founded.

3. At the time of the sale there was no subsisting indebtedness of these defendants to plaintiff, by virtue of the judgment or decree rendered herein, or by reason of any claim or claims upon which such judgment or decree was founded.

4. The debt, upon which said judgment or decree was founded, had been fully paid and discharged.

This motion was overruled by the court, to which ruling the defendants duly excepted, and appealed to this court.

1. The questions presented by this appeal relate to the legal effect of the release of the defendant Field, as shown by the releases herein set forth, upon the defendants Ervin and Metcalf, and to the necessary consequences that follow such release. The notes, upon which the judgment was rendered, were joint and several promissory notes, signed by the defendants, Field, Ervin and Metcalf. After the rendition of the judgment, and before the order of sale was issued, the plaintiff, for the consideration of $1,528.30, paid to him by Field, released Field from all his liability on account of said notes and judgment, reciting, in the release, that the discharge of Field should in no manner affect the liability of the defendants Ervin and Metcalf.

The first release, herein mentioned, was filed with the clerk of the court, and is not under seal. The second one, however, which is a release from all liability on account of the notes and mortgage, and necessarily a release from the judgment and decree rendered thereon, is a formal instrument, properly sealed, witnessed, acknowledged and recorded, and is of the same character of instrument as the

mortgage which it discharges, so that the question of the validity of a release under seal, or not under seal, does not necessarily arise here; but, as the question has been made and argued, we feel justified in saying that the first release, being not under seal, but a valuable consideration having been paid for the execution thereof, is a valid instrument, and that a seal thereto would not add to its validity. Where a consideration is expressed in a release, or admitted, or otherwise proved to have passed between the parties, a seal is entirely immaterial.

The consideration gives character to the instrument, and the technical effect of a seal is only important, as it relates to a question of evidence. A seal imports a consideration. It furnishes evidence of itself that a consideration passed between the parties; but, if a consideration can be otherwise proved, a seal is not necessary, except in those cases where a release is designed to effect the conveyance or transfer of real estate, or some interest therein. A release, without a seal and without a consideration, is void; and the same rule applies as well to bonds, promissory notes, and all other instruments in writing, as to releases. And so a release with a consideration, but without a seal, is of binding force, subject to the foregoing limitation as to real estate, the distinction being that, where the consideration is not implied or expressed, it must be proved. 1 Pars. on Notes & Bills, 248; *Benjamin* v. *McConnell et al.*, 4 Gill. 545; 13 Johns. 87; 1 Cow. 122.

These releases, then, being valid instruments, we come to the consideration of the question as to the effect of the release of Field upon his co-joint debtors, Ervin and Metcalf. Does his release discharge his co-obligors?

It is contended by the plaintiff that these notes being several as well as joint obligations, the release of one of the makers does not discharge the others. In other words, that the plaintiff, the payee, can discharge either of the joint makers, and retain the liability against the others, because of the several characters of the obligation. We do not think that reason or the authorities support the proposi-

tion. On the contrary, we hold that a release of one of two or more joint and several debtors, is a release of all, and this seems to be the language of the books since before the time of Lord Coke. The reason for the rule is obvious. The debt is entire, and when once satisfied or released, can no longer be enforced against any party to it. One satisfaction to an entire debt, duty or obligation, be it several as well as joint, is all the law will enforce. The several character of the obligation does not change the rule or the reason thereof. The doctrine contended for seems to be that in a joint and several obligation the obligee can enforce payment as many times as there are obligors to the instrument. There is no authority for such a proposition. Where there is one entire debt there can be but one discharge, one payment, and one satisfaction, and if one of the joint and several debtors pays the debt and receives his discharge, such discharge must necessarily release his co-debtors.

A reference to the authorities, we believe, will sustain the foregoing propositions.

In Bacon's Abridgment, vol. 8, p. 276 (*g*), it is laid down that if two or more are jointly and severally bound in a bond, a release to one discharges the others; and, in such case, the joint remedy being gone, the several is so likewise.

In Story on Promissory Notes, section 425, the same principle is enunciated as follows: A release of one joint maker or indorser by the holder, whether they are accommodation parties or not, will discharge all the parties, for such a release is a complete bar to any joint suit, and no separate suit can be maintained in such a case. In short, when the debt is extinguished as to one it discharges all, whether the parties intended it or not. The like rule applies to cases where a satisfaction has been made by any one joint maker or indorser, or by any one partner in two firms where each firm is bound upon the note. See Chitty on Bills, ch. 9, 449, 450; Bayley on Bills, ch. 9, 342, 344; 1 Story's Eq. Jur., § 112; Byles on Bills, 232.

So in the case of *Tuckerman et al.* v. *Newhall*, 17 Mass. 580, the same doctrine is fully maintained.

This was an action of assumpsit on a joint and several promissory note, signed by Joel and Isaac Newhall as principal, and by Cheever Newhall as surety. The defendants pleaded the general issue, which was joined, and a special plea in bar, wherein it was alleged that after making the note an indenture of three parts was entered into by said Joel and Isaac Newhall, who were copartners in trade, of the one part, three persons as trustees, of the second part, and divers of the creditors of the said J. & I. Newhall, among whom was the plaintiff, of the third part, in and by which indenture the plaintiffs, for the considerations therein mentioned, released the said J. & I. Newhall from all claims and demands which they had against them.

Upon the questions made by this plea in bar, the court say: As to the first point made by plaintiffs' counsel, that admitting the indenture to operate as a release to J. & I. Newhall, yet it will not have that effect on the defendant, because his promise is several as well as joint. This has already been answered.

The authorities are perfectly clear that a release to one joint and several obligor discharges both.

And so in the case of *Wiggin* v. *Tudor*, 23 Pick. 444, the court say: The rule of law is, that a release of one of two joint and several debtors is, in legal operation, a discharge of both, because the debt is entire; and, when once satisfied, can no longer be enforced.

In the case of *Benjamin* v. *McConnell and others*, 4 Gill. (Ill.) 536, the court say: A release of one of two or more joint, or joint and several obligors or promisors, is a release of all; and this doctrine is affirmed in the case of *Rice* v. *Webster et al.*, 18 Ill. 331.

It seems useless to multiply authorities, upon a proposition so well settled, and we have no hesitation in saying, that the release of Field, for a valuable consideration, from all liability upon the notes and mortgages mentioned and set out herein, is also a release of Ervin and Metcalf. There can be but one discharge, but one satisfaction of the debt, and if Field discharged the debt, then there is no claim against Ervin and

Metcalf. It is not possible to discharge one of two joint and several obligors, and retain a legal obligation against the others. And this leads us to the consideration of the proviso in the release, wherein it is specified that the release of Field shall not affect the liability of Ervin and Metcalf.

Recurring again to Bacon's Abridgment, vol. 8, p. 277 (*g*), we find this language: "If two are bound in an obligation, and the obligee releases to one of them, proviso that the other shall not take advantage of it, the proviso is void."

In the case of *Benjamin* v. *McConnell et al.*, the appellees sued the appellant, upon a note payable on demand, for $204.44, payable to Murray McConnell and Holloway Van Syckel, and signed by C. Benjamin & Co. The appellant pleaded payment; second, that appellant and Delehay made the note as partners; that on the 27th day of March, 1844, appellees made an agreement in writing with Delehay, and filed the same of record in the Scott circuit court, in a chancery suit then pending in that court, between *McConnell, Van Syckel and James A. McDougall*, complainants, v. *Mark W. Delehay*, defendant, by which agreement Delehay was discharged from the payment of the note, and the same as against him was released and canceled; that, by this agreement, it was expressly provided that the same should not operate to release Benjamin, nor to be considered as canceled as to him, and that this agreement was made upon a compromise and settlement of the chancery suit. It will be seen that the proviso to this release was the same in effect as the one in the case under consideration. As to the effect to be given to this proviso, the court say: That a proviso in a contract, totally repugnant to the contract itself, is void. Delehay has been wholly released from the payment of the note; on his part there is no longer any liability. Benjamin cannot be sued alone. If an action be brought against them jointly, Delehay can interpose no plea founded on this agreement, personal to himself. The release, when set up, is an effectual bar to the cause of action, and destroys the right to maintain the suit. The contract is entire, whatever discharges one releases the other.

In the case of *Rice* v. *Webster et al.*, the court having under consideration a release containing a proviso similar to that in the case last cited, and of the same legal import as the proviso in the case at bar, say: Here is manifestly an attempt to discharge absolutely one of the parties, and to retain the legal obligation against the other. This the law will allow no ingenuity of language to effect. The paper is a nullity or it must be made effectual. It is either a release of both, or it is of no benefit to either. It is founded upon a legal consideration moving from one of the parties which has the same legal effect as if it had moved from the other party or both parties jointly. It releases Willey forever from all process arising upon the joint demand, and then undertakes to impose the condition or to make the release depend upon the condition that Rice should not thereby be released. To give effect to this condition would be to destroy the release itself, even as to Willey. The condition is therefore repugnant to the previous covenant, and must destroy it, or be destroyed by it. When that is the case the rule of law is well settled that the condition must give way that the covenant may stand. See, also, *Owen* v. *Homan*, 20 L. J.; *Wiggins* v. *Tudor*, 23 Pick. 434; *Stearns* v. *Tappin*, 5 Duer, 294; *Hoosac* v. *Rogers*, 8 Paige, 229; *Joy* v. *Warz*, 2 Wash. C. C 266.

So we say in the case we are considering; the release to Field is a nullity or it must be made effectual. Field paid more than $1,500 for this release, and the effect of this payment and the execution of the release is precisely the same as if this consideration had moved from Field, Ervin and Metcalf. It not only releases Field, but also Ervin and Metcalf, or Field is still liable for the full amount of the debt notwithstanding the payment of $1,500. The proviso is repugnant to the covenant, and must fall that it may stand. We, therefore, say that the legal effect of the release to Field was a payment and cancellation of the entire debt and judgment against Field, and also against Ervin and Metcalf, and the order of sale having been issued, and the sale made, upon a judgment that had been fully can-

celed and discharged, the same are utterly void and of no effect.

2. After the rendition of the judgment, and in the proceedings to sell the mortgaged premises, the plaintiff seems to have acted upon the supposition that the release to Field was a nullity, not only as to Ervin and Metcalf, but as to Field himself, and that the payment by Field to him of $1,528.30, was a pure donation; for, we find that the execution and order of sale was issued for the full amount of the judgment, no credit having been given on account of the payment by Field, and all the mining ground mentioned and described in the mortgage, including the one-half released to Field, was sold and bid in by plaintiff for the sum of $3,200, that being the amount of the judgment and costs, so that, as the case stands, the plaintiff has received $3,025.70, the amount of the judgment, and also $1,528.30, making the sum of $4,544 recovered upon a judgment of $3,025.70. Such a proceeding, in the absence of any explanation thereof, violates every principle of honesty and fair dealing; and to confirm this sale would be to rob one man that another might receive twice what belongs to him.

If the release was utterly void as to all the parties, the sale, under the circumstances disclosed in the record, would have to be set aside.

3. The remaining question relates to the computation of interest upon the notes herein set forth.

The first bears date July 19, 1869, and is payable on or before the 1st day of June, 1870, with interest at the rate of three per cent per month until paid.

The second note is of the same character, bearing date July 19, 1869, and payable on or before the 1st day of August, 1870, with interest at the rate of three per cent per month until paid.

Our statute provides (Bannack Stat. 535): "Creditors shall be allowed to collect and receive interest, when there is no agreement as to the rate thereof, at the rate of ten per cent per annum, for all moneys after they become due on any bond, promissory note," etc., etc.

Section 3 of the same act provides that: "The parties to any bond, bill, promissory note, or other instrument in writing, may stipulate therein the payment of a greater or higher rate of interest than ten per cent per annum, and any such stipulation contained in any such instrument of writing may be enforced in any court of law or equity, of competent jurisdiction, in this Territory."

Under this statute, we have already heard (*Davis* v. *Hendrie*, *ante*, 499), that it was competent for parties to contract for a higher or greater rate of interest than ten per cent per annum, after the maturity of the note, so that the only question now for us to determine is: Did the parties so contract in the notes upon which the decree in this case was founded?

By the terms of the notes, was there any contract or agreement to pay interest at the rate of three per cent per month after the notes became due? Do the words "with interest at the rate of three per cent per month until paid" import a contract to pay interest at that rate after the maturity of the notes?

It will be seen by a computation of the interest upon the notes, that interest at the rate of three per cent per month was calculated and allowed in the decree from the date of the notes up to the date of the rendition of the decree, whereas the defendants contend that by the terms of the notes they only contracted to pay interest at that rate to the maturity of the notes.

The contract set out in these notes must be construed like any other contracts. If there is no ambiguity or uncertainty in the agreement, we must look to the words of the contract to arrive at the intention of the parties.

Let us examine this contract. Take for instance the first note. The makers promise to pay to the payee $400 on or before the 1st day of June, 1870, with interest at the rate of three per cent per month until paid. This agreement to pay interest must be construed with reference to the balance of the contract. The contract is to continue in force until the 1st day of June, 1870, at which time the note becomes

due and payable, and the agreement as to interest cannot be extended without express words to that effect beyond the time fixed for the payment of the principal. The payee promises that the makers may have the money until the 1st day of June, 1870, and no longer, and the makers promise that they will pay at that date. There is no intimation that this contract is to be extended beyond the date fixed by the parties, and the contract being reduced to writing would preclude any parol understanding of the kind. So, then, after the note has run its allotted time, at a given rate of interest, that is when the contract has expired by its own limitation, the relative rights of the parties, as fixed by the contract, ceases. They contract for a definite fixed period. The time expires, the money becomes due, and its payment can be enforced, and if not enforced, the amount of the note becomes so much money due, and the statute fixes the rate of interest.

The case of *McLane* v. *Abrams et al.*, 2 Nev. 199, is relied upon as opposed to the view herein expressed. The Nevada statute which controlled the case is as follows:

"Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract. Any judgment rendered on such contract shall conform thereto and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment."

This statute was held to continue the rate of interest as fixed in the note, after its maturity, and up to the time of the rendition of the judgment. The case depended for its decision entirely upon the wording of the Nevada statute, and in the absence of any such provision in our statute the case cannot be taken as authority here.

The doctrine that the words "until paid," must be construed with reference to the date of payment, is sustained in the decision of *Brewster* v. *Wakefield*, 22 How. 118. In that case it appears that Brewster, on the 11th day of July, 1854, executed his two promissory notes, whereby in one of them he promised to pay, twelve months after the date

thereof, to the order of Wakefield, the sum of $5,583.25, with interest thereon at the rate of twenty per cent per annum from the date thereof, for value received, and in the other promised to pay to the order of said Wakefield the further sum of $2,000, twelve months after date, with interest thereon at the rate of two per cent per month from the date.

In one of the notes it was an agreement to pay interest at such a rate per *annum*, and in the other at such a rate per *month*.

Chief Justice TANEY, in delivering the opinion of the court, says: "The contract being entirely silent as to interest if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law and not by any provision of the contract. Nor is there any thing in the character of this contract that should induce the court by supposed intendment of the parties or doubtful inferences to extend the stipulation for interest beyond the time specified in the written contract."

That is to say, the intention of the parties shall be arrived at by the words they use to convey their meaning. And in the case at bar, we say the words, "until paid," when taken in connection with the balance of the contract wherein the date of payment is fixed, are controlled by this limitation. and they do not extend the contract beyond this date, any more than the words *per annum* or *per month* did in the case of *Brewster* v. *Wakefield*. These words in and of themselves do not make a contract, and when construed with the balance of the agreement are in perfect harmony with it and together make a complete contract. To hold that these words extend the contract the court must say that the parties, in the absence of any stipulation upon the subject, agreed for a valuable consideration that these notes should not be paid at their maturity, but that they should run for an indefinite period, at the pleasure of either party, and that the time of payment was wholly indefinite and uncertain. If the court should take upon itself to say this, it would simply make a contract for the parties, to which

the parties themselves would be utter strangers, which contract would be perfectly indefinite as to its duration and void for the want of a consideration.

There is nothing in the nature of the contract to induce a court by doubtful inferences to extend the stipulation as to interest, and we are certainly not called upon to manufacture a new contract for the parties, and then to give a construction to this child of our own imaginations.

We have held that parties may stipulate and agree as to the rate of interest after the maturity of the note, but the court cannot supply such an agreement, and if a greater rate of interest than ten per cent per annum is to be received after the note becomes due, it must be so written down in the bond.

Judgment reversed and cause remanded.

Judgment reversed.

WORMALL, respondent, *v.* REINS, appellant.

PRACTICE—*amendments to pleadings.* Courts, in their discretion, can allow amendments to a complaint before the case is submitted to a jury, to make the allegations correspond with the proof.

PRACTICE—*amendments to allegations not denied in answer.* In this action, to recover damages for mal-practice by a physician, the court did not abuse its discretion in allowing the plaintiff to amend the complaint, after the testimony had been closed, by striking out the words "fractured" and "broken," although the answer did not deny the allegation of the complaint, that the elbow and arm of plaintiff were "dislocated, put out of joint, disrupted, broken, fractured, wounded and bruised."

PRACTICE—*continuance after amendments during trial.* The court did not abuse its discretion in refusing a continuance, after the plaintiff had been permitted to make an amendment to the complaint during the trial, which did not present a new material issue.

Appeal from the Third District, Lewis and Clarke County.

THIS case was before the court at the January term, 1872, *ante*, 124. After the action was commenced by plaintiff, she

was married to A. H. Wormall. In March, 1872, the case was tried by a jury, that found for plaintiff for $5,000 damages. The court, WADE, J., overruled a motion for a new trial, and Reins appealed.

The facts are stated in the opinion.

E. W. TOOLE, CHUMASERO & CHADWICK, and SHOBER & LOWRY, for appellant.

The complaint avers, and the answer does not deny the averment, that the coronoid process of respondent's arm was broken and fractured. The evidence of the medical experts shows that such an injury was not susceptible of cure. Respondent must prove that appellant treated an incurable injury to respondent in an unskillful manner. The allowance of the amendment to the complaint, omitting the words "fractured and broken," changed the gist of the action. It injured the appellant, and did not subserve substantial justice. It rendered inapplicable all the evidence for the appellant. Appellant is entitled to a new trial, to meet an issue unknown to the case when it was tried.

The affidavits of appellant and his attorneys show that they were surprised by the allowance of this amendment, and the continuance should have been granted. This refusal to continue the case was arbitrary. In all cases in which amendments are allowed, to conform to the proof and surprise followed, a continuance is always granted. Appellant has a right to meet the newly-made issue at a subsequent trial.

W. F. SANDERS and G. G. SYMES, for respondent.

The allowance of amendments and granting of continuances are entirely within the discretion of the court. A case will not be reversed on this ground unless it is clearly shown that there was an abuse of discretion. 1 Van Sant. Pl. 812–818; *Kreisten* v. *Madden*, 38 Cal. 158; *Pierson* v. *McCahill*, 22 id. 127; *Walden* v. *Craig*, 7 Wheat. 576.

The amendment was made in this case to make the pleadings conform to the proof, and enable the jury to decide the

case on the evidence. It was allowed in furtherance of justice. *Hunter* v. *Hudson River*, 20 Barb. 493.

Appellant was not surprised by the amendment. The testimony for one week turned upon the point whether or not the coronoid process was fractured. If appellant thought that this fact was admitted in the complaint, why did he allow evidence to be introduced regarding it? And why did he introduce evidence to prove what he claims the complaint admitted?

Amendments can be allowed during the trial to present the real issues: and it is not too late after the testimony is closed. 3 Estee's Pl. 301, and cases cited; *Valencia* v. *Couch*, 32 Cal. 339; *Stringer* v. *Davis*, 30 id. 318.

KNOWLES, J. This is an action for damages for the malpractice of the appellant Reins while acting as a surgeon.

The only errors complained of in the argument of appellants is the allowing of an amendment to the complaint after the close of the testimony on the trial of the cause and the refusal of the court to continue the cause on the application of the defendants after allowing such amendment.

The complaint averred that the elbow and arm of the plaintiff, Minnie Wormall, was dislocated, put out of joint, disrupted, broken, fractured, wounded and bruised. The answer of the defendant did not traverse this allegation. The contest in the case seems to have been from the statement of the evidence in the record upon the point as to whether the elbow was put out of joint and dislocated, and what is termed the coronoid process of the ulna at the elbow was broken. The plaintiff introduced evidence to the effect that the elbow was only put out of joint and dislocated, and that the coronoid process was not broken. The defendant offered evidence to the effect that the elbow was not only dislocated, but this coronoid process was broken. It seemed to be conceded by all the experts in the case, that if the coronoid process at the elbow had been broken, that the hurt suffered by plaintiff was a much more serious one than a simple dislocation of the elbow joint, and one much more

difficult to be treated. The defendant's attorneys asked the court to instruct the jury that the plaintiff had admitted in the pleadings that the arm was both fractured and dislocated, and the jury must take this allegation as true, and in considering whether the defendant is liable, take this fact into consideration. The plaintiffs thereupon offered to amend their complaint to correspond with the proofs in the case, and show that the arm of the defendant was only dislocated at the elbow. This the court permitted them to do. The court may, in furtherance of justice and upon such terms as are just, allow the amendment of any pleading at any stage of a proceeding. This power is a discretionary one, and this court cannot review the exercise of the same. Unless there has been some abuse of that discretion, courts have frequently permitted pleadings to be amended even after verdict and judgment to correspond with the proofs in the case, and I can see no reason for refusing to allow the amendment of a pleading to correspond with the proofs before the cause is submitted to a jury.

In the second place the power to grant or the refusal to grant a continuance, also rests in the legal discretion of the court to whom such application is made, and the refusal to grant the same, or the granting thereof, cannot be reviewed by this court unless there appears to have been an abuse of this discretion.

Where the evidence, on a trial, introduced by the plaintiff goes to the point that only a dislocation of the elbow joint was the injury suffered by the plaintiff, and that the coronoid process of the ulna was not fractured, and the testimony introduced by the defendant goes to the point that the elbow joint was not only dislocated, but that the coronoid process of the ulna was fractured and the court permitted the plaintiff to amend his pleadings so as to present this issue, we cannot see that such action would be any ground for a continuance. It may be proper to remark, also, that the amendment of the plaintiffs was not of such a serious character as the plaintiffs seem to think it was. It is true that the complaint did allege that the arm and elbow were both

dislocated and fractured. This was not, however, an admission that the elbow was dislocated and that the coronoid process of the ulna was fractured, a peculiar and unusual fracture. There may be other fractures of the arm and elbow besides that of the coronoid process of the ulna, and fractures which would not very materially have affected the treatment of a dislocated elbow. It cannot then be considered that this admission was one of any great importance in this case because it is not an admission of a fracture that rendered the treatment of the dislocated elbow difficult.

Section 79, page 42, of our practice act provides that "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

As the admission in the record cannot be considered as an admission of the fracture of the coronoid process of the ulna, the most material issue in the case, and the only one claimed by the defendant to have existed, I think that admission was not one that affected the substantial rights of the parties.

The allowing of an amendment in the pleadings so as to preclude this admission, was not one that presented any new material issue in the case, and hence there could have been no abuse of discretion in refusing a continuance for that cause.

Judgment of the court below is affirmed, with costs.

Judgment affirmed.

RADER, respondent, *v.* ERVIN et al., appellants.

MORTGAGE — *decree of foreclosure — rights of redemptioners.* A decree, which orders a sale of mortgaged premises to satisfy the aggregate amount of several mortgages on separate parcels of property, made to secure the payment of distinct debts of different sums, due at different times and bearing different rates of interest, and which does not preserve the rights of redemptioners, is void.

MORTGAGE — *assignment — seal.* The assignment of a mortgage is valid without a seal.

CASE AFFIRMED. The case of *Collier* v. *Field*, *ante*, 612, holding that certain promissory notes bear certain rates of interest, affirmed.

Appeal from the First District, Jefferson County.

IN May, 1872, the court, MURPHY, J., overruled the motion of Ervin and Metcalf to set aside the sale of certain property under a decree of court for the foreclosure of certain mortgages, and they appealed. The facts are stated in the opinion.

PAGE & COLEMAN, for appellants.

The decree is void as to appellants, and should be set aside. The action was not brought as a chancery suit. The complaint is not framed as a bill in chancery, and prays legal rather than equitable relief. *Dunphy* v. *Kleinschmidt*, 11 Wall. (U. S.) 610; *Orchard* v. *Hughes*, 1 id. 76.

Appellants were not made parties defendant, as no process was prayed against them. 1 Dan. Ch. Pr. 391; Story's Eq. Pl., § 44.

Courts cannot take judicial notice of the signatures of persons, not officers thereof. No proof was made to the court of the genuineness of the signatures of what purports to be an acknowledgment of service indorsed on the summons. *Alderson* v. *Bell*, 9 Cal. 315. No order *pro confesso* was made before the decree was entered.

The decree is not warranted by the complaint. The note to Blacker could be sued upon again by the holder.

The notes that respondent paid could not be sued upon again. Respondent's only remedy is for money paid to the use of appellants.

The assignments of the last two mortgages to respondent are not under seal and are invalid. Respondent could not bring a suit on those mortgages. The common-law rules as to such instruments are not changed by our statute. Acts 1865, 479.

The property enumerated in the mortgages is not identical in any two of them. The court erred in making the sum of the alleged debts a lien upon the whole property mortgaged. Property included in first mortgage should be exhausted before recourse is had upon a second, so that the amount of redemption money due upon each may be accurately ascertained. *Roan* v. *Reynolds*, 11 Cal. 14.

The computation of interest, upon which the decree is founded, is erroneous. There was no contract for interest after the maturity of the notes. *Brewster* v. *Wakefield*, 22 How. (U. S.) 118. Respondent could collect legal interest only. Acts 1865, 535; *Talcott* v. *Marston*, 3 Minn. 344.

The sale of property under the decree is void. The sheriff is not an officer of the chancery court. The transfer of the judgment from respondent to Collier satisfied the same. Brightly's Fed. Dig., "Release," 15.

W. F. SANDERS, G. G. SYMES and A. G. P. GEORGE, for respondent.

Appellants appeared and made no objection to the entry of the decree in the court below. The decree is in accordance with the rules of practice of the supreme court of the United States in equity and the provisions of the Code. Rule 92, U. S. Sup. Ct. Rules.

Appellants voluntarily appeared, and no process was required. The court heard proof sufficient to enable it to render judgment. The decree also recites that due proof of service of process was heard, which would include proof of the genuineness of signatures of appellants admitting service of process.

The complaint states facts sufficient to constitute a cause of action on each of the notes. The decree is supported by the complaint. The surety in a note may pay the same and sue the maker, and foreclose the mortgage given to secure it the same as the original payee.

The assignment of a debt secured by mortgage is not required to be under seal. The mortgage follows the note as collateral without assignment.

This court has decided in *Davis* v. *Hendrie*, *ante*, 499, that the interest was properly calculated.

Appellants cannot raise the point that respondent is not the owner of the notes, after judgment. Such an objection can only be raised by demurrer or answer.

Collier purchased the judgment to protect his lien on the same property, which was subject to the lien of respondent. The transfer of the judgment from respondent to Collier did not satisfy the judgment.

The question of setting aside the sale was in the discretion of the court. The decision will not be reversed unless there was an abuse of discretion affecting the substantial rights of the parties.

Most of the objections raised by appellants are mere irregularities which are cured by the judgment. They could only have been taken advantage of during the progress of the proceedings.

There is no order in the transcript overruling the motion to set aside the sale. This objection cannot be noticed. The only question is, will the complaint support the decree? A sale cannot be set aside after the sheriff's report of sale and delivery of the certificate of sale, on motion. A bill in equity must be filed.

WADE, C. J. This is an appeal from an order in the court below, overruling a motion to set aside a sale of real property, made under and by virtue of a proceeding to foreclose certain mortgages, mentioned and described in plaintiff's complaint, and the correctness or incorrectness of the ruling upon this motion can only be determined by a determination of the sufficiency of the complaint.

The complaint substantially avers, that on the 12th day of September, 1870, the defendants, William M. Ervin, W. H. Metcalf, David Blacker and Reuben Rader, executed a promissory note to A. M. Woolfolk, for the sum of $1,300, payable in twelve months after date, with interest at the rate of two per cent per month, from date, until paid; also, that said defendants executed to Clark, Conrad and Curtin, a certain other promissory note, for the sum of $500, payable on or before the 1st day of June, 1871, with interest at the rate of two per cent per month, from date, until paid; that said notes were signed by said Blacker and Rader, as sureties for said Ervin and Metcalf; that to secure said sureties for so signing said notes, in the event that they were compelled to pay the same, said defendants, on the 19th day of September, 1870, executed to said Reuben Rader a mortgage upon certain mining property, situate in Jefferson county, which mortgage was duly acknowledged and recorded; that to secure said Blacker for so signing said notes, said defendants executed to said Blacker a certain other mortgage upon the same and other property, as described in the mortgage to Rader, which mortgage was properly acknowledged and recorded: *that on the 22d day of September*, 1871, *said notes were duly paid by said Rader, and indorsed on said notes;* that the mortgage to Blacker also provided for the payment of a certain other note, for $1,000, given to said Blacker by said defendants, Ervin and Metcalf, bearing interest at the rate of two per cent per month; that on the 26th day of September, 1871, said mortgage was duly assigned to said Rader.

For a second cause of action, said complaint alleges that on the 15th day of March, 1869, the defendants, Ervin and Metcalf, executed and delivered to T. C. Collier their certain promissory note, for the sum of $800, payable on or before the 1st day of August, 1869, in bankable gold dust, with interest at the rate of four per cent per month; that to secure the payment of said note, said defendants executed and delivered to said Collier a mortgage of that date, which mortgage covers a part of the same property as the mort-

gage to Rader and the mortgage to Blacker, and said mortgage, also, covers other property not included in the Rader and Blacker mortgages, which mortgage was duly acknowledged and recorded; that on the 26th day of September, 1871, said note and mortgage was duly assigned to this plaintiff.

Upon this showing, the plaintiff demands judgment against defendants, Ervin and Metcalf, for the sum of $4,819.10, that being the amount due upon the notes, in the complaint described, with interest at the rate mentioned in the notes, from their respective dates, up to the time of filing the complaint, and for a decree ordering a sale of the mortgaged premises.

The defendants make default, and thereupon a decree is entered in favor of the plaintiff, wherein the sum of $4,819.10 is found due the plaintiff, upon the notes in the complaint described, and it is ordered and adjudged, that all and singular, the mortgaged premises, mentioned and described in the complaint, be sold to satisfy the amount so found due the plaintiff. Afterward, on the 8th day of November, 1871, the plaintiff sold and assigned his interest in this decree to T. C. Collier, and on the 27th day of December, 1871, the mortgaged property, mentioned in the complaint, was sold in one parcel by the sheriff of said county, to T. C. Collier, for the sum of $3,300. Afterward, at the May term, 1872, of the district court for Jefferson county, to wit, on the 16th day of May, 1872, the defendants made their motion to set aside such sale, which motion was overruled, and the defendants appealed to this court.

It will be seen by an examination of the record that Rader, by virtue of his mortgage, had a lien upon certain property belonging to defendants; that Blacker, by virtue of his mortgage, had a lien upon certain other property, and that Collier, by his mortgage, had a lien upon certain other property still. These mortgages were assigned to Rader, and he thereby held separate mortgages on separate parcels of property to secure the payment of separate and distinct debts of different amounts, and due at different

times with different rates of interest. The decree does not ascertain the amount secured by each or either of these mortgages, but does ascertain the aggregate amount secured by all the mortgages taken together, and orders a sale of the mortgaged premises to satisfy such amount. The result of the decree is to order the sale of property to satisfy mortgages that are not and never were liens upon the property ordered sold; that is to say, the effect of the decree is to give to Rader a lien to secure his debt upon property not included in his mortgage, and to give to Blacker a lien for his debt upon property not included in his mortgage, and to give to Collier a lien upon the property of Rader and Blacker, included in their mortgages but not included in the Collier mortgage; so that Rader receives the benefit of Blacker's mortgage, and Blacker of Rader's, and Collier of both the others, and both the others of Collier's.

In a word, the decree creates liens for the parties where they have failed to do it themselves; and not only this, it injures and destroys the liens made by the parties, and gives to the subsequent mortgagee the same security as that of the prior mortgagee.

Suppose the mortgage to Rader had been ample to secure his indebtedness, while that to Collier had been entirely insufficient to secure the indebtedness to him, yet by the decree Collier is made equal to Rader, and secures a lien upon property to which he was and is a perfect stranger.

There is another peculiarity about this decree. It is a fraud upon the rights of redemptioners under the statute. The statute provides that property of this kind sold, by virtue of the foreclosure of a mortgage, may be redeemed by the judgment debtor or by his successor in interest, or by a creditor having a lien by judgment or mortgage on the property sold, or on some part thereof, subsequent to that on which the property was sold, and the statute further provides that the judgment debtor or redemptioner may redeem by paying the purchaser the amount of his purchase, with twelve per cent thereon in addition. Now suppose that the judgment debtors desired to redeem the property mortgaged to Rader, what amount shall be paid?

The decree is silent as to the amount due upon this mortgage, and for any thing that appears in the decree there may be nothing due, or the full amount of the decree may have been based upon this mortgage.

Suppose a subsequent mortgagee upon the property mortgaged to Rader desired to redeem the property covered by Rader's mortgage, for the purpose of securing his own debt? He can only redeem by paying $4,819.19, that being the amount found due by the decree, and twelve per cent penalty thereon, while it is a fact that $4,819.10 represents the amount found due not only upon the Rader mortgage, but upon two other mortgages given to other parties, and upon separate and distinct parcels of property.

The decree virtually prohibits redemption, and thereby deprives the parties of rights secured by the statute.

If it is competent in any event to join in one decree several mortgages, given to different parties, upon separate and distinct parcels of property, to secure separate debts of different dates and amounts (which is a very doubtful proposition), the decree must be so drawn as to preserve the rights of redemptioners to each and every parcel of property included in the decree. Mortgages are not made for the sole and exclusive benefit of the mortgagee. The mortgagor has certain rights, and any decree that deprives and robs him of any substantial right given by the statute is void, and the decree in this case is of that character.

The complaint avers that Rader fully paid the notes upon which he was surety, and notwithstanding the averment of payment, the complaint declares that the full amount of the notes still remains due and unpaid. We conceive that the averment should be, not that there is so much due upon the notes, but that Rader having paid the notes, the amount of such payment is due to him as for so much money paid, laid out and expended for defendants. The notes having been fully paid, it cannot be said there is any thing due upon them, but the amount paid is due on account of such payment.

The appellant maintains that the written assignments of

the mortgages, mentioned in the complaint, not being under seal, are therefore void. The objection is not well taken. An assigment under seal is not necessary. The mortgage is an incident to the debt. The debt is the principal thing, and the mortgage follows it as a shadow does the substance. The assignment of the debt carries with it the mortgage, and the rule is not changed if the assignment is in parol. An assignment of a mortgage without the assignment of the debt it was intended to secure is a nullity.

Interest upon the notes mentioned in the complaint should be computed according to the rule declared in the case of *Collier* v. *Field*, decided at this term.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

CREIGHTON et al., appellants, *v.* HERSHFIELD et al., respondents.

CASE AFFIRMED. The case of *Gallagher* v. *Basey*, *ante*, 457, holding that legal and equitable causes cannot be blended together, affirmed.

EQUITY — *jury trial — void decree.* A decree, which is rendered upon the verdict of a jury in an equitable action, that has been tried as a suit at common law, is void.

EQUITY — *jurisdiction of courts under organic act.* The jurisdiction as to law and equity, of the courts of the Territory created by the organic act, are as separate and distinct as those that were known and defined at the time of the adoption of the constitution.

EQUITY — *actions at law — trial — jurisdiction.* A court has no jurisdiction in this Territory to try a common-law action as a suit in equity; and it cannot try an equitable action as an action at common law.

EQUITY — *foreclosure of mortgage — personal judgment.* In an equitable action to foreclose a mortgage, a court cannot render a personal judgment against the mortgagors, and decree a sale of the mortgaged premises to satisfy such judgment.

JUDGMENT — *jurisdiction.* The judgment of a court that exceeds its jurisdiction is void.

UNDERTAKING ON APPEAL — *void judgment for deficiency.* An action for the non-payment of a judgment cannot be brought upon an undertaking on appeal, providing for the payment of any deficiency arising upon the sale of mortgaged premises, if no judgment for such deficiency was rendered in the original suit.

Appeal from the Third District, Lewis and Clarke County.

THIS case was before the court in December, 1868, *ante*, 66.

In November, 1870, the court, SYMES, J., rendered a judgment in favor of Creighton *et al.*, plaintiffs, for $4,400. The court, WADE, J., sustained the motion of Hershfield *et al.*, defendants, for a new trial in December, 1871, and plaintiffs appealed. The facts are stated in the opinion.

E. W. & J. K. TOOLE, for appellants.

Respondents were intervenors in the original suit of appellants' assignors. *Griffith et al.* v. *Hermann et al.* Respondents appealed from the decree therein and executed the undertaking sued on. The decree was in accordance with the old chancery practice. The bond subserved its purpose, and stayed the sale of the mortgaged premises and secured a hearing in the appellate court. The decree was sustained by the supreme court and became the law of the case until reversed by some competent tribunal. This decree is in full force until reversed, and cannot be attacked in this action or collaterally. The undertaking speaks for itself and there was a consideration to support it. *Lomme* v. *Sweeney*, *ante*, 584.

The bond provides for the payment of the deficiency after a sale under the decree, which was affirmed, and not for any judgment that may be docketed. The bondsmen have nothing to do with the clerk's duty to docket a judgment for deficiency on the coming in of the sheriff's return. It is not one of the conditions of their bond. The bondsmen are liable under the statute, and their undertaking upon a sale of the property under the decree, when the amount of the deficiency is ascertained. The decree, sheriff's return, sale, etc., were made before this suit was commenced.

If the statute prevails, respondents cannot escape the liability fixed by the decree, sale, bond and judgment. If the statute does not prevail, it is a bond executed by principals and sureties, and subserved its purpose on appeal. Respondents are bound by the conditions of their bond. The

legislature has properly provided for the giving of undertakings on appeal. Civ. Prac. Act 1867, §§ 202, 336.

CHUMASERO & CHADWICK, for respondents.

The decree in the case, in which the undertaking sued on was given, blended law and equity in the same proceeding. The relief demanded was a personal judgment and a sale of mortgaged property. The case was tried by a jury and a general verdict was rendered. No judgment for any deficiency was ever entered or asked for. The trial was conducted as a trial at common law, and the decree was entered thereon. The decree was, therefore, void. *Dunphy* v. *Kleinschmidt*, 11 Wall. 610; *Noonan* v. *Lee*, 2 Black, 499; *Orchard* v. *Hughes*, 1 Wall. 77; *Fenn* v. *Holme*, 21 How. (U. S.) 484.

No action can be maintained on a bond given on appeal from a void decree. When a court acts without authority, its judgments are void. *Elliott* v. *Piersol*, 1 Pet. 340; *Hollingsworth* v. *Barbour*, 4 id. 471.

A void judgment is not made valid by an affirmance on ground not affecting its validity. Brightly's Dig. 505, §§ 78, 79, 82, and cases cited.

The jurisdiction of any court may be inquired into by every court, where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings. *Chemung C. B.* v. *Judson*, 4 Seld. 254; Brightly's Dig. 505, § 77, and cases cited.

Where it is manifest on the record that a court has exceeded its jurisdiction, the judgment is void. 21 Barb. 9.

The bond sued on contains a provision not required by the statutes. If more be added to the condition of a bond prescribed by statute than the statute requires, no breach can be assigned on such part of the condition. Brightly's Dig. 104, and cases cited.

WADE, C. J. This cause comes into this court on appeal from an order in the court below, granting a new trial. The record discloses the following state of facts: Some time

prior to the 13th day of May, 1868, Joseph Griffith and William Thompson commenced an action, in the district court for the third district, against John Hermann and Solomon Star, to foreclose a certain mortgage, given by said Hermann and Star to said Griffith and Thompson. The defendants, Lewis H. Hershfield and A. Hanaur, having a mortgage against the same parties and upon the same property, and claiming priority over Griffith and Thompson, were made defendants in said action, and permitted to set up their claim of priority. The cause was tried and submitted to a jury, upon the evidence and instructions from the court, and the jury, having found that the Griffith and Thompson mortgage was a prior lien to that of Hershfield and Hanaur, and having found a general verdict for the plaintiffs for the amount of their claim, thereupon the court rendered a personal judgment upon such verdict against said Hermann and Star, for the amount of plaintiffs' debt and costs, and, in default of payment, ordered a sale of the mortgaged premises, directing that the proceeds of such sale be applied first to the payment of Griffith and Thompson, and the balance, if any, to the payment of the claim of Hershfield and Hanaur. From this decree, rendered on the 13th day of May, 1868, the defendants, Hershfield and Hanaur, appealed to the supreme court of the Territory, and executed a bond for such appeal, in pursuance of the statute. The case was tried in the supreme court, and the judgment below, having been modified as to the amount of interest included in the judgment, was affirmed.

The plaintiffs, Griffith and Thompson, having assigned the undertaking, given on appeal to these plaintiffs, they, on the 21st day of June, 1870, commenced a suit thereon to recover the amount of the judgment rendered as aforesaid, less the amount received from the sale of said mortgaged premises. The defendants, Hershfield and Hanaur, appeared and defended in said action, and in their answer set out the record in the original suit, wherein it appeared that said action, being a suit to foreclose a mortgage and to adjust priorities of liens, was submitted to a jury, and a general

verdict rendered therein, upon which verdict the court rendered a personal judgment against the defendants, and ordered a sale of the mortgaged premises; and the jury, having found plaintiffs' mortgage to be a prior lien to that of defendants, Hershfield and Hanaur, the court directed and ordered the proceeds of such sale to be applied accordingly. That part of the answer setting up said judgment and decree having, on motion, been stricken from said answer, the cause was, by consent of parties, submitted to the court, sitting without a jury.

The court made a finding of facts and conclusions of law, and thereupon rendered judgment for plaintiffs.

Afterward, at the December term, 1871, of said court, the statement having been settled, the defendants submitted a motion for a new trial, on consideration whereof the same was sustained, and a new trial granted, and from the order granting a new trial the plaintiffs appeal to this court.

The solution of one question ought to determine this case. The suit of *Griffith and Thompson* v. *Hermann and Star* was an equitable action to foreclose a mortgage and adjust priority of liens, and regularly the chancery jurisdiction of the court would have been invoked. The case was, in fact, tried as a common-law action to a jury, and the decree was rendered upon the verdict, and not upon the facts founded by the chancellor.

Did such action render the judgment void, or was it simply an irregularity that did not affect its validity?

We have already decided in the case of *Gallagher et al.* v. *Basey et al.*, *ante*, 457, that legal and equitable causes of action cannot be joined in one suit: neither can an equitable defense be made to a legal cause of action, and it may be well in determining the question at bar to ascertain the reasons for this decision. By the organic act, section 9, the supreme and district courts are clothed with chancery as well as common-law jurisdiction, and in interpreting this language, we may safely recur to decisions of the federal courts, wherein the meaning of section 2, article 3 of the constitution, in which it is declared "that the judi-

cial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States," etc., is judicially settled and determined; for the federal courts in the States, by this language of the constitution, are given the same jurisdiction as to law and equity, as are the supreme and district courts of this Territory by the organic act.

We believe that an examination of these decisions will show that this language of the constitution and of our organic act, was intended to and did confer upon the courts therein named, chancery as well as common-law jurisdiction, as these two jurisdictions were known and defined at the time of the adoption of the constitution, and that the jurisdictions thus conferred are entirely separate and distinct from each other; that they cannot be blended together in this Territory; and that if a common-law action is tried as a suit in chancery, or an equitable action as an action at law, in either case the proceedings are void, for the reason that in either case the court would act within its jurisdiction or authority, and its act would be a nullity.

In the case of *Fenn* v. *Holme*, 21 How. 484, the court say: "By the constitution of the United States, and by the acts of congress organizing the federal courts, and defining and investing the jurisdiction of these tribunals, the distinction between common-law and equity jurisdiction has been explicitly and carefully defined and established." "In the act of congress to establish the judicial courts of the United States this distribution of law and equity powers is frequently referred to, and by the sixteenth section of that act, as if to place the distinction between these powers beyond misapprehension, it is provided 'that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law,' at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, proceedings at common law and proceedings in equity, with reference to the exercise of the judicial power

of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable, as contradistinguished from legal rights of the equity law, as defined and enforced by the court of chancery of England."

In the case of *Parsons* v. *Bedford et al.*, 3 Pet. 446, the court holds this language: "The constitution had declared in the third article, 'that the judicial power shall extend to all cases in *law* and *equity* arising under this constitution, is the laws of the United States,' etc. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find that the amendment (7th amendment) requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that the distinction was present in the minds of the framers of the amendment. By *common law* they meant what the constitution in the third article denominated, 'LAW,' not merely suits which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined in contradistinction to those where *equitable rights* alone were recognized and equitable rights administered."

In the case of *Bennett* v. *Butterworth*, 11 How. 669, the chief justice of the United States uses this language:

"The common law has been adopted in Texas, but the forms and rules of pleading in common-law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court. And as there is no distinction in its courts between cases at law and equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiffs' petition either as a declaration at law or as a bill in equity. Whatever may be the laws of Texas in this respect they do not govern the pro-

ceedings in the courts of the United States. And although the forms of proceeding and practice in the State courts have been adopted in the district court, yet the adoption of the State practice must not be understood as confounding the principles of *law* and *equity*, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim be an equitable one he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States."

These authorities, it seems to us, ought forever to settle the question as to the blending of law and equity in one action in this Territory, while our organic act remains unchanged, and applying the principles herein enunciated to the case under consideration, we are compelled to say it was error in the court below to render a personal judgment against defendants in the first instance, and then to decree a sale of the mortgaged premises to satisfy such judgment, thus granting both legal and equitable relief in the same suit.

And we deduce from the foregoing authorities, that in determining whether a case shall be tried as at common law or in chancery, we simply determine a question of jurisdiction, and we say, in the light of these authorities, that a court having common-law as well as equity jurisdiction, has no authority to try an equity case as a case at common law, neither has it authority or jurisdiction to try a case at law as a suit in chancery.

In a suit in chancery the decree must emanate from the chancellor. He must find the facts. He alone is responsible, and the decree must proceed directly from him; while in an action at law the jury find the facts, and the court has no jurisdiction whatever over the facts.

The suit at bar was an equitable action to foreclose a mort-

gage on certain real property, and to ascertain the priority of liens between the several mortgages. There were no facts found in the case by either court or jury. There was a general verdict for plaintiffs, and a personal judgment against defendants, and a decree ordering a sale of the premises rendered thereon. The case was tried as a simple common-law action. The testimony was produced before the jury, instructions given by the court, verdict for plaintiff and judgment and decree thereon.

Suppose this had been a suit at law, for instance, to recover damages for breach of contract, and the court had denied the plaintiff a jury trial, and had ordered the trial to the court, and had rendered judgment in such suit; this would have been manifest error, and the judgment void, for the reason that the court has not jurisdiction or authority to try such a case without the intervention of a jury. And so, for the same reason, suppose this had been an equitable action, for example, to compel the specific performance of a contract, or to correct an accident or mistake where there was no adequate remedy at law, and the court had refused to try the case as a chancellor, finding the facts and rendering a decree thereon, but had ordered the case to be tried to a jury and had directed them to find a general verdict, making the jury alone responsible for the finding of fact. Such verdict and such finding would be a nullity, for the reason that the court has not jurisdiction or authority to try such a case to a jury.

In equity causes, where the chancery jurisdiction of the court is rightfully invoked, the judge, sitting as chancellor, has the sole and exclusive jurisdiction to find the facts and to make the decree, and this authority cannot be delegated to the jury, only in such a manner as to make the chancellor alone responsible for the facts. This is an elementary principle in equity jurisprudence, and is one of its distinguishing features, whereas in an action at law the jury has the sole and exclusive jurisdiction over the facts, and the court simply renders judgment upon the facts found. We arrive at this conclusion: that an equity case wherein the

chancery jurisdiction of the court is properly called into requisition, cannot be tried as a common-law action to a jury, and if so tried and prosecuted to judgment and decree, such judgment and decree is void.

This view of the law is clearly presented in the case of *Dunphy* v. *Kleinsmith*, 11 Wall. 614. In that case the court say: "This case was clearly a case of chancery jurisdiction and one necessarily requiring equitable as distinguished from legal relief. The property, according to the charge of the complaint, had been put beyond the reach of the ordinary process of the law. It had been disposed of by the assistance and through the co-operation of Dunphy in such a manner that the judgment creditors could not find it to satisfy their claims, or if found, it was held by Dunphy under cover of an assignment, which *prima facie* gave him the legal title." "In a country or territory where the systems of common law and chancery both substantially prevail, it is perfectly clear that chancery only could give adequate relief in such a case. And then the case was instituted and the pleadings were framed strictly in accordance with this view. The bill is strictly a bill in chancery praying for equitable relief. Now it is perfectly obvious that, with the exception of the verdict being rendered by nine jurors, the trial was altogether conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at common law. *This was clearly an error.*"

"The case being a chancery case, and being instituted as such, should have been tried as a chancery case, by the modes of proceeding known to courts of equity. In those courts, the judge or chancellor is responsible for the decree. If he refers any questions of fact to the jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury. Here, the judgment is pronounced as the mere conclusion of law, upon the facts found by the jury."

If we should substitute the names of the parties to the suit we are considering, the foregoing language would apply with equal force. It is perfectly obvious in the case under consideration, as it was in the Dunphy and Kleinsmith case, that the trial was, altogether, conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at common law. And this being a chancery case, and admitted to be such, as the Dunphy case was, and being instituted as such, should have been tried as a chancery case, by the modes of proceeding known to courts of equity. And if the failure to try the Dunphy and Kleinsmith case, according to the modes of the chancery practice, was error, the same failure in this case was equally erroneous.

In the case referred to, the court say, that its trial as a common-law action was clearly an error. This language must be taken to mean, that the judgment and decree, in that case, were null and void, for they reverse the case and send it back for a new trial, because of this *error;* whereas, if they had considered this *error* as a mere irregularity, not going to the validity of the judgment, they would have affirmed it in a modified form, so as to cure the irregularity. An error or irregularity, going to the jurisdiction of the court that will reverse a judgment, is such an error that renders such judgment void.

Why was the judgment and decree in the Dunphy and Kleinsmith case erroneous and void? Simply because the court exceeded its jurisdiction, in trying an equity case as an action at common law. It is purely a question of jurisdiction, and as clearly defined as the law, which prohibits a justice of the peace from trying the title to real property.

Where it is manifest on the record that a court has exceeded its jurisdiction, the payment is simply void. 21 Barb. 9; 16 U. S. Digest, 169, § 8.

To uphold the judgment and decree in the case of *Griffith & Thompson* v. *Hermann & Starr*, we must, at one blow, abolish all distinction in the modes of trial in actions at law and suits in equity, and we must say that these two juris

dictions, so carefully preserved in the constitution, in our organic act, and in the numerous decisions of the supreme court of the United States, are entirely meaningless, and that it is equally competent to try an equity, as a common law case to a jury. We must say, further, that our district courts have no distinctive equity jurisdiction; that the evidence should not be preserved in a chancery suit; that the jury, and not the chancellor, is responsible for decrees in chancery; that such decree can be rendered upon a general verdict, in the absence of any finding of fact, and that the statute of the Territory, and the rule of the supreme court of the United States, in suits to foreclose mortgages requiring judgment for deficiency to be entered after the coming of the return of sale, showing that the full amount of the claim has not been made by the sale, are mere nullities and of no force or authority whatever. We are not prepared to thus overturn the very source and foundation of our jurisprudence.

The judgment and decree in the case of *Griffith & Thompson* v. *Hermann & Star* being void, the undertaking, given on appeal from the same, is also void, and cannot furnish the foundation for a right of recovery in this action.

The undertaking sued on is in proper form, and provides for the payment of any deficiency arising upon the sale of the mortgaged premises, in pursuance of the statute; but no judgment for deficiency is asked for or given, as required by the rule of the supreme court of the United States, and the statute of this Territory, in suits to foreclose mortgages, so that the bond provides for a condition not contained in the case, and no breach of the bond or undertaking can be assigned for non-payment of the judgment, unless we say that the personal judgment for the full amount of the mortgage, rendered upon the verdict of a jury, is a judgment for deficiency, as contemplated and required by the statute and the rule aforesaid. We are not called upon to create a condition, and then to assign a breach of the undertaking for a violation thereof.

If the case had been tried to the court, sitting as a chan-

cellor, and if the decree had been based upon facts found by the court or judge, and, through inadvertence, accident or mistake, a personal judgment had been rendered for the full amount of the money due on the mortgage, undoubtedly this court could correct such mistake or irregularity, and render a judgment for deficiency; but the judgment, being void from its inception, we cannot give it vitality and then correct an irregularity thereon.

The order granting a new trial was properly made, and the judgment below is affirmed.

Judgment affirmed.

THORP et al., appellants, *v.* FREED et al., respondents.

PRACTICE — *assignment of errors.* This court will not review errors which do not point out wherein the evidence is insufficient to support the findings of fact.

PRACTICE — *opinion — findings.* The opinion of the chancellor in an equitable action is not a finding of facts.

PRACTICE — *reasons for judgment.* A cause will not be reversed because the court rendered its judgment for erroneous reasons.

WATER — *appropriation for irrigation — riparian proprietors — laws of Territory and congress relating to water rights — local customs.* WADE, C. J., and KNOWLES, J., have discussed these questions in their opinions and arrived at different conclusions. MURPHY, J., could not act as a member of the court, and did not express any opinion at the time the case was examined. There is no opinion of the court and a syllabus of these opinions is omitted by the reporter.

Appeal from the Third District, Lewis and Clarke County.

THE court, WADE, J., rendered the decision in this case. The facts are stated in the opinions.

CHUMASERO & CHADWICK and E. W. TOOLE, for appellants.

Counsel filed an argument containing authorities on the questions on which there was no opinion of the court.

SHOBER & LOWRY, W. F. SANDERS and R. LAWRENCE, for respondents.

[The reporter has omitted that part of the argument relating to the water questions.]

There are no written findings in this case and none were demanded by appellants. Civ. Prac. Act, § 180; *Sanchez* v. *McMahon*, 35 Cal. 225.

No defects or specifications of errors are pointed out, as required by statute. *Hidden* v. *Jordan*, 28 Cal. 302; *Beans* v. *Emanuelli*, 36 id. 120.

Findings must be excepted to specially and exception must be saved in the court below. *Hurlburt* v. *Jones*, 25 Cal. 225; *Warner* v. *Holman*, 24 id. 228.

The opinion of the court below cannot be treated as a finding. 3 Estee's Pl. 432, and cases cited.

CHUMASERO & CHADWICK and E. W. TOOLE, for appellants, in reply.

This is an equity case, governed by the rules of the supreme court of the United States and chancery practice. It is unnecessary to specify errors, as when a case at law is appealed. 2 Abb. (U. S.) Prac. 228; 2 Dan. Ch. Prac. 1484; *Wiscart* v. *Dauchy*, 3 Dall. 321; *The San Pedro*, 2 Wheat. 132.

The civil practice act and California decisions under the same are not applicable to this case. This court must enter into a re-examination and rehearing of the entire case upon the record.

KNOWLES, J. This case, in some respects, is anomalous. The plaintiffs assert a right to the waters of Prickley Pear creek, as appropriators thereof for the purposes of irrigation, and complain that the defendants have diverted some of the waters of said creek, and prevented the same from flowing into plaintiffs' irrigating ditches, and ask for an injunction to prevent the continuance of this breach of their rights.

The question of the right, in this Territory, to appropriate water for the purposes of irrigation, is one of great importance and general interest, and which, perhaps, ought to be

determined at the earliest day possible. Undoubtedly, this cause might be decided, in view of the manner in which it is presented to this court, without considering this question; but, as it was presented in the trial, in the court below, and is ably discussed in the arguments of both appellants and respondents, we feel called upon to express our views concerning it.

The common-law rule was, that he who owned land upon the banks of a running stream, or land over which the same flowed, had a right to have the waters thereof flow down, to or over his land, undiminished, materially, in quantity or quality. The riparian proprietor could use the water flowing past or over his land for domestic purposes and to quench the thirst of man and animals; but no one was permitted to divert water from the channel where it was accustomed to run, for the purposes of irrigation. Certainly such a diversion of water would both diminish materially its quantity and quality. The first legislative assembly of Montana Territory enacted:

"That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with the special enactments of this Territory, shall be the law and rule of decision, and shall be considered as of full force until repealed by legislative authority." Laws of Montana for 1864 and 1865, 356.

The only way that a court can escape the bearing of this statute on this subject would be to hold that the common law, upon the question of riparian proprietors, was either inapplicable or was not of a general nature, or was in conflict with some enactment of the legislative assembly of this Territory, or of the congress of the United States.

We have running streams, upon whose banks people live and hold land, and this would be sufficient to show its applicability. We do not conceive that a court can say that the provisions of the common law are not for the best interests of this section of country, and therefore inapplicable. The question of whether or not a law is for the good of the people in our Territory, is a matter for legislative, and not

judicial, consideration. Much of the common law of England pertains to the English form of government, and the privileges of castes, which are not at all applicable to our form of government; and these are the provisions of the common law, I presume, the legislative assembly had in view in the enactment above referred to as inapplicable. It seems to be contended, by the court below, that the natural wants of man, and the physical and climatic conditions of this Territory, have of necessity changed the common law upon the subject of riparian proprietors, or that these show that that law is inapplicable, in part at least. And it was held by the court below that, in accordance with the demands of our section, the common law was so modified that any one, living upon the banks of a running stream, as a riparian proprietor, can divert the waters thereof, for the purposes of irrigation, to the extent of the land he cultivates; and that he who is nearest to the source of the stream shall have, by virtue of his position, the right to first divert the waters of the same, to the exclusion of those below him thereon, if necessary to irrigate his land, even though those whose lands are nearer the mouth of the stream should have occupied them for years, and spent large sums of money in improving them and making a homestead thereon, prior to the fortunate settler above them. Surely the climatic and physical conditions of this country cannot be such as to create a law so at variance with natural equity and so fatal to the improvement and prosperity of our best agricultural districts. It must be apparent to all that the best agricultural lands in this Territory are not at the sources of the streams. Our broad valleys, as a rule, are better adapted by nature for settlement and agriculture than our narrow and rocky canons and mountain gorges. If we were called upon to say what were the necessities of this country, in regard to the use of water for the purposes of irrigation, we should reply that there was a demand that water should be used for that purpose, and that the considerations of the general welfare of the country and the principles of natural equity should guaranty to the prior appropriator of water

for such use the first right to the use of the same, to the extent of his necessities for domestic purposes, the quenching of the thirst of himself or animals, and for agricultural purposes. We can see no reason why, if the common law is to be changed by the considerations above named, it should not be changed to suit the wants of the country and in accordance with the principles of equity. We hold, however, that a law that is a part of a system of laws which our legislative assembly have adopted cannot be annulled or varied by a court, through any such considerations.

In the second place the common-law, upon the subject of riparian proprietors, is of a general nature.

In the third place, has this law been repealed or modified by the act of the legislative assembly or by act of congress?

The congress of the United States, by an act approved July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes," provides "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes aforesaid, is hereby acknowledged and confirmed."

If the right to the waters of Prickly Pear creek have accrued to and become vested in the plaintiffs by priority of possession, and the right to the same has been acknowledged and recognized by the customs, laws, and decisions of the courts of this Territory, then there is no doubt but that the common-law doctrine, in relation to the rights of riparian proprietors, has been changed. It is not denied in the answer but that the plaintiffs have appropriated a portion of the waters of the said creek. The plaintiffs must recover, if at all, upon their right of appropriation. They have based their right upon this, and not as riparian proprietors.

Ever since the settlement of this Territory, it has been the

custom of those who settled themselves upon any portion of the public domain, and devoted any part thereof to the purposes of agriculture, to dig ditches, and turn out the waters of some stream to be used to irrigate the same. This right has been generally recognized by our people. It has been universally conceded that this was a necessity in agricultural pursuits. So universal has been this usage that I do not suppose there has been a parcel of land to the extent of one acre cultivated within the bounds of this Territory that has not been irrigated by water diverted from some running stream. Both plaintiffs and defendants recognize this custom and the necessity of the same. Both are diverting water from the Prickly Pear creek for this purpose. If a practice so universal, and which has so long prevailed, does not establish a custom, it would be most difficult to do so. There have been but few disputes up to this time upon the subject of the use of water for the purposes of irrigation, and in not one of these, as far as we are informed, has the right to devote water to such a use been denied. It may safely be asserted the right to appropriate water for the purposes of agriculture have been recognized and acknowledged by the customs of this Territory.

In the second place, has this right been acknowledged and recognized by law? The first legislative assembly of this Territory passed an act upon the subject of irrigation. The first section of that act is as follows:

"That all persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are in the banks, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river for the purpose of irrigation, and making said claim available to the full extent of the soil for agricultural purposes."

The second section provides for the right of way for the construction of ditches, for the purpose of taking water out of a stream, creek or river for the purposes of irrigation See Bannack Stat. 367, §§ 1, 2.

This statute was in force at the time the plaintiffs made their appropriation of water, and at the time the act of congress above referred to became a law. This statute, as far as it could, established and recognized the right of appropriation of water for agricultural purposes. Of course it could not establish this right as against the general government, or any person claiming thereunder. But as against any other parties the plaintiffs would have the right to the use of any water appropriated for that purpose if they are prior appropriators. As far as the legislative assembly of Montana had the power, they repealed the common-law doctrine in regard to riparian proprietors. If it is claimed that this statute does not recognize the doctrine of "prior in time, prior in right," the answer to this is, that when the law gives a man the right to divert water from a stream to irrigate his land to the full extent of the soil thereof, and in pursuance of this law he goes and digs a ditch, or constructs machinery for the purpose of taking water from a stream for this purpose at great expense, the principles of equity come in and say that no other man can come in and divert this water away from him. That he is prior in time in availing himself of the benefits of such a statute, and his rights are prior to any subsequent appropriator. It is claimed by the respondents, and it would appear was held by the court below, that this statute had been decided to be void as in conflict with the organic act of this Territory. The decision referred to did not hold that the whole of this statute was void, but only a portion of it. The statute conferred upon certain officers, called commissioners, the right to apportion the water of any creek "having reference to the legal rights of the parties." This court held that this conferred upon these commissioners the power to determine what were the legal rights of the parties, that this was a judicial power, and that the judicial power of this Territory was vested in certain courts by the organic act, and that our legislative assembly had no authority to confer any portion of it upon the commissioners provided for in that act. The declaring of certain provisions of a statute void will not

certainly have the effect of declaring all of the provisions of a statute a nullity. One part of a statute may be good and one part bad. We can see no reason for holding any other portions of that statute void at this time than were declared such by the decision referred to. It was a rightful subject of legislation to repeal or modify the doctrine of riparian proprietors in this Territory so far as the same affected the possessory rights to the soil thereof. The fact that this law was subsequently repealed does not affect the decision in this case. The rights of the plaintiff had become vested and had accrued before that repeal. The repeal of a statute will not destroy vested rights. Another act recognizing the same right was enacted in its place. I hold, then, that the law of this Territory did recognize and acknowledge the right to the use of water for the purposes of irrigation, and that it recognized it in the prior appropriator, to the extent his soil could be devoted to agriculture and no further.

Thirdly, has this right been recognized and acknowledged by the decisions of the courts?

In California the courts have sustained the rights to appropriate water for mining purposes. The courts of this Territory have followed and repeatedly approved of those decisions. The legal grounds for sustaining such a right have been based upon the view that the unsurveyed lands of the United States, upon which any community settles, must be treated as belonging to no one. Hence, the one who first appropriates any portion thereof, or incident thereto belonging, for a beneficial purpose, would become the owner thereof until the general government, or some one claiming thereunder, should assert title to the same. The right of the first appropriator to unowned property has always been recognized and protected by the common law. Of course this right can be regulated by law. The California decisions hold that there is no difference between the appropriation of water for mining and milling purposes. *Ortman et al.* v. *Dixon et al.*, 13 Cal. 33; *McDonald & Blackburn* v. *The Bear River and Auburn Water & Mining Company*, id. 220

In this case the court hold the following language: "We have held that there is no difference in respect to this use, or rather purpose to which the water is to be applied, at least, that an appropriation for the use of a mill stands on the same footing as an appropriation for the use of mines."

We would be justified in the inference from this language that that court did not make any difference in the use or purpose for which water was appropriated, if the use was a beneficial one.

The courts of this Territory, and of California, have sustained the right to appropriate agricultural land for agricultural purposes upon the unsurveyed public domain. The water that flows over land is but an incident to it. There are no grounds upon which a court could sustain the right to appropriate land that would not apply to the right to appropriate the water flowing over land, an incident to the land itself. To give the one right and deny the other, would be the granting of the right to a party to appropriate every vestige of a piece of property and deny him the right to appropriate a small portion thereof. The right to appropriate water for mining or milling purposes, resting in this country before the act of congress above referred to, upon the grounds that no one owns the property, and that the appropriation is for a beneficial purpose, establishes a principle that certainly ought to allow the appropriation of water for the purposes of irrigation. In this latter case no one, it would be presumed, owned the water, and the appropriation would be for a beneficial use.

Whenever a legal rule is once established by legal decisions, it controls all cases which come within the reason of the rule. "Adjudged cases become precedents for future cases resting upon analogous facts and brought with the same reason." 1 Kent's Com. 537.

"*Ubi eadem ratio ibi idem jus*" is a familiar legal maxim, one which courts of law have long acted upon in arriving at legal determinations.

Broom, in his work on Legal Maxims, page 131, shows how a decision in relation to the alteration of a deed or bond

was declared to be authority in the alteration of a bill of exchange and a promissory note, because the reason of the rule established in the former cases was applicable to the latter, and finally the decisions in these were held to be authority in the case of the alteration of a guaranty for the same reason.

"The law consists not in particular instances and precedents, but in the reason of the law, for reason is the life of the law." Broom's Legal Maxims, 130.

The reason of the rule that allows parties to appropriate water for mining or milling purposes being such that it would fully sanction the appropriation of water for the purposes of agriculture, and there being no reason why the courts should sustain the right to appropriate land and deny the right to appropriate water, a mere incident to land, for the purposes of irrigation, I think we can safely say that the appropriation of water for that purpose has been acknowledged and recognized by the decisions of the courts. To hold otherwise, because no decision had been made in this Territory maintaining the right to appropriate water for this identical purpose, would be "sticking in the bark" and ignoring the spirit of the law, and disregarding the maxim of which our common-law jurisprudence has been so boastful, that reason is the soul of the common law.

The right to appropriate water for the purposes of irrigation having, in our opinion, been acknowledged and recognized by the customs, laws and decisions of the courts of this Territory, the law of congress comes in and says that whenever, by priority of possession, the right to the use of water for this purpose "have vested and accrued," "the possessors and owners of such vested rights shall be maintained and protected in the same."

This is in effect a grant to such parties of this right. It appears from the statement of the evidence in this case, that all of the parties to this action now own the government title to their lands. But this will not vary the rule above established in this case. Whatever rights the parties had in relation to the waters of the Prickly Pear creek, vested

before any of these parties acquired their rights to the land under the general government. This decision, it will be understood, does not go to the extent of allowing parties to appropriate and divert water so as to prevent the same from flowing over land to which a party had obtained the government title after the acquisition of this title. If no one before the pre-emption and entry of land by a party has acquired the right to divert the waters of a stream, then the patent from the general government conveys the water as an incident to the soil over which it flows. If it has been appropriated before the time when the patent takes effect, it does not.

It is claimed, however, that this act of congress was only to affect settlers upon the public domain as long as it remained unsurveyed and was not open for pre-emption and entry. There is no reservation of this kind in the act itself. And to show that this was not the intention of congress we have an amendment to that act, approved July 9, 1870. A part of the seventeenth section of this amendatory act is as follows:

"And be it further enacted, That none of the rights conferred by sections 5, 8 and 9 of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act, and all patents granted or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this is amendatory."

This part of that section clearly demonstrates that congress did not and does not intend that the rights granted by section 9 of the previous act should be confined to the unsurveyed public domain. This amendatory, or rather confirmatory, section only declares what the courts would have been compelled to hold was the legal effect of section 9 of the previous act. A grant of a right cannot be divested by a subsequent grant. The words used in section 9 were, as

we have said, in effect a grant. A grant made by law is as effectual as a grant made by deed or patent. And a subsequent grant of land would be subject to any previous grant of a water right. After a full consideration we are impelled to the conclusion that the right to appropriate water for the purposes of irrigation in this Territory stands upon as good, if not a better, footing as the right to appropriate water for mining purposes. This right has been and is subject to be regulated by law. And that the doctrine in relation to riparian proprietors has been abrogated to a considerable extent. Before the government title to land, over which water flows, has been acquired by a private person, such water may be appropriated and diverted in accordance with legal provisions. Afterward it cannot, and the doctrine of riparian proprietors would prevail as to it.

The case of *Vansicle* v. *Haines*, 7 Nevada, cited in this case, is not in point. In that case the government had parted with the title to the soil over which the water flowed before the act of congress of July 26, 1866, above referred to. The patent to Haines of the soil before the passage of that over which the water flowed carried with it the water as an incident thereto, and after the government had parted with this incident to the soil it could not grant it to any one else. I certainly agree with the opinion of the court in that case.

Having arrived at the legal rules by which we will be governed in relation to the appropriation of water for the purpose of irrigation, we come now to the consideration of whether under the issues presented in this case and the facts found by the court any rights of the plaintiffs have been infringed so as to entitle them to the injunction prayed for in their complaint.

The plaintiffs aver in their complaint that during the years 1865, 1866 and 1867 they appropriated all of the waters of Prickly Pear creek for the purposes of irrigation. That all of the waters of said creek are necessary to irrigate their lands, which they aver they located during the same years they appropriated the water, and that the said lands are upon and contiguous to the said creek. That all of the

waters of said creek are necessary to irrigate their land, and was used by them for that purpose, and without it they would be unable to produce any crop, and aver that the defendants have diverted and used the water of said creek appropriated by them, and continue and threaten to continue to do so.

The defendants deny that the plaintiffs appropriated all of the waters of Prickly Pear creek. Deny that all of the waters of said creek are necessary to irrigate the land of the plaintiffs, and deny that they have diverted more than five hundred inches of the water of said creek, and aver that their appropriation of the same was prior to any appropriation of the plaintiffs thereof. There are other issues presented in the pleadings. These are enough, however, for the purpose of determining the points presented.

The court refused to grant the injunction prayed for by plaintiffs and gave the defendants judgment for costs.

The plaintiff moved for a new trial, and as grounds therefor assigned the following list of errors:

1. The court erred in refusing to grant the plaintiffs the injunction prayed for in their complaint.

2. The court erred in ordering judgment to be in favor of defendants and against the plaintiffs.

3. The court erred in its finding of fact.

4. The court erred in its conclusions of law.

5. That the findings of both law and fact are against the evidence.

There are no other specifications of error in the record than the above. This assignment of errors is so general that, as has been frequently held by this court, they cannot be considered. This court, in this particular, has followed those of California. See *Hutton* v. *Reed*, 25 Cal. 483; *Partridge* v. *San Francisco*, 27 id. 415; *Fitch* v. *Bunch*, 30 id. 208.

The assignment of error should point out wherein the error was committed. Upon that distinct point, our practice act provides: "When the notice designates as the ground upon which the motion will be made, the insuffi-

ciency of the evidence to justify the verdict, or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient."

In this case there was no verdict, the cause being a chancery one and no findings of fact by the court. When the court fails to file any findings, the presumption of law is that the court found every material issue in the case against the losing party and in favor of the party that was successful. The opinion of the court cannot be treated as a finding of facts. It is not what is contemplated by the statutes of this Territory as a finding of facts. Our statute upon this subject is the same as that of California. The courts of that State have held that it cannot be treated as such. See *Hidden* v. *Jordan*, 28 Cal. 305; *McClory* v. *McClory*, 38 id. 575.

The statement does not specify the particulars in which the evidence is insufficient to support any of the findings of fact which the law presumes were found. Treating the opinion of the district court as a finding of facts, and the statement does not specify the particulars in which any thing expressed therein which could be considered as a finding of fact, is unsupported by the evidence. Under our statute, then, the statement must be disregarded. Laws of 1867, p. 172, § 195.

Although there may in fact have been errors in the findings of facts, which this court will presume were found by the court below, we have no means of reviewing them.

The material issues having been found against the plaintiffs and in favor of the defendants, there certainly was no error in law for the court to refuse to grant the injunction asked for by the plaintiffs, unless the defendants in their answer raised no material issue which it was necessary for the plaintiffs to establish in order to entitle them to recover. No such claim is made by the appellants. This court will not reverse a cause because it holds that the reasons a court may have given for his decision were erroneous.

Judgment affirmed, with costs.

WADE, C. J. I concur with Justice KNOWLES, that the

judgment of the court below should be affirmed, with costs, but being unable to agree with him as to some of the doctrines enunciated in his opinion herein, and the questions involved in this case being of absorbing and general interest, I feel justified in stating my views thereon.

Both the plaintiffs and defendants have acquired title from the government to the lands they possess. They are the absolute owners thereof. The plaintiffs' farms are situate on, contiguous to and in the neigborhood of the Prickly Pear stream, below the farms of the defendants. The defendants' farms are situate on and contiguous to said stream, and above those of the plaintiffs. The plaintiffs located their farms in 1865, 1866 and 1867, and claim to have appropriated all the waters of said Prickly Pear stream. The farms of defendants were located subsequently to those of plaintiffs, and their appropriation of water for the purpose of irrigating their said farms was subsequent to that of the plaintiffs. The plaintiffs claim all the waters of the stream by virtue of their said appropriation, and bring this action to restrain the defendants.

It is claimed that the local customs, laws and decisions of the courts of this Territory authorized the plaintiffs to hold said waters by virtue of their prior appropriation ; and also that the law of congress of July 26, 1866, quoted in the foregoing opinion, establishes plaintiffs' right.

It will be observed that three things must concur before this act of congress can, in any manner, affect the rights of the parties here, if it is at all applicable to the questions at issue.

First. The plaintiffs' right to appropriate such waters must be recognized and acknowledged by the local *customs* of the Territory.

Second. This right must be established by the *laws* of the Territory ; and

Third. It must be acknowledged and recognized by the decisions of the courts.

Under and by virtue of this law of congress, it is not enough to say that this right of appropriation is established

by the local *custom*, nor is it sufficient that the law authorizes it, or that the *decisions* of the courts uphold it, but all three of these requisites must concur and affirmatively exist to establish this right.

There is no proof whatever in the case tending to show the existence of any peculiar local custom or usage within the district where these lands are located authorizing the appropriation of said waters by the plaintiffs. And to say there is such custom, we must do so in the absence of any proof to establish the fact, and, as I believe, when the fact itself does not exist.

What is a custom, and how does it become a part of the law? In the first place it must be *certain*. It must be clearly defined and unmistakable. It must be free from doubt. And it must be *reasonable*. It must not be inconsistent with itself. Customs cannot make a contradictory or unreasonable law. It must be *continuous*. It must have existed uninterruptedly for a long period of time. Every custom varying the general law presumes a grant at its inception. To establish a local custom derogating from the general law, it is not enough to prove that the act has been frequently done; it must be shown to be so generally known and recognized that a fair presumption arises, that the parties entered into their contract with a silent refer ence to it.

A custom is only obligatory upon the parties when the law does not provide for the case. A local custom, opposed to the provisions of a statute, is not binding. This is the general law upon the subject of customs, and there is nothing in the case to intimate that the local usages and rules of the district where this controversy arose have, in any manner, varied or changed the general doctrine upon the subject of customs. So we are compelled to resort to the general law in order to ascertain what a custom is.

This Territory was organized in 1864, and hardly a settlement in it is eight years' old, and the notion that a custom can grow up in that short period, and become a part of the established law of the land, it seems to me violates

every rule applicable to customs. It is certain enough that men have taken up and claimed to appropriate the waters of the streams of this Territory, but ever since the settlement of the Territory, the question as to the right to do this has been in constant litigation, and the right has not been established or acquiesced in.

Let us inquire how this doctrine, that prior appropriation of water carried with it priorty of right, first made its appearance.

When the mineral lands of California were discovered, people flocked there by thousands. The lands they entered upon belonged to the government and were unsurveyed. They were simple trespassers upon the public domain, and the courts of California held, *for the reason that they were trespassers* and had no rights upon the grounds they were occupying, that the first trespasser who took up and appropriated water could hold it against a second trespasser. This was a correct holding under the peculiar situation, and the peculiar circumstances of the case, but this doctrine grew out of these peculiar and anomalous circumstances, and had its foundation in the fact that the occupiers of these mineral lands were trespassers. This doctrine was never applied to agricultural lands in California, for the whole reason thereof falls to the ground when the government comes to part with its title, and sells its lands to actual purchasers.

And because this principle of "prior in time, prior in right" became thus established in California, as applied to mineral lands of the public domain, an effort has been made in this Territory to apply the same doctrine to agricultural or farming lands, but the principle has never been acquiesced in by the people, and is now in litigation all over the Territory. And it seems to me perfectly clear that the reason for the doctrine as applied to trespassers upon the public domain, utterly fails when applied to actual purchasers from the government of agricultural lands.

So we say the principle of "prior in time, prior in right," as applied to the appropriation of water for the purposes of

irrigation, is not an established custom of the country. This alone would make inoperative the act of congress of July 26, 1866. But let us inquire if this principle is established by the statutes of the Territory.

It is claimed by the act of the Territorial legislature of January 11, 1865, that priority of appropriation carries with it priority of right, and two sections of said act are quoted in the opinion of Justice KNOWLES, to establish this view of the statute. We submit that in the construction of this statute it must be taken as a whole, and we have the right, and it is our duty, to look at the whole statute in order to arrive at the intention of the legislature. And looking at the whole statute, we say most unhesitatingly, that the whole purpose of the statute was to utterly abolish and annihilate the doctrine of prior appropriation, and to establish an equal distribution of the waters of any given stream in the agricultural districts of the Territory.

The fourth section of said act provides: "That in case the volume of water in said stream or river shall not be sufficient to supply the continued wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners as hereinafter provided, whose duty it shall be to apportion in a *just* and *equitable* proportion a certain amount of said water upon certain alternate weekly days to different locators, as they may in their judgment think best, for the *interest of all the parties concerned*, and with due regard to the legal rights of all."

If this section of the law does not mean that there shall be an equal distribution of the waters of a stream among all the parties concerned in such water, without any regard whatever to the date of location or appropriation, then we are utterly unable to comprehend the language used. It provides that the commissioners shall apportion the waters of the stream in a just and equitable manner among all the parties along the stream. Suppose one man had appropriated all the waters of a stream, and twenty other men lower down had and owned farms through which the

stream ran, can it be doubted that under this statute the commissioners would have been compelled to apportion the waters of the stream among the riparian owners equally? It seems to me the question does not admit of a doubt.

Then the doctrine contended for is not established by the Territorial statute of 1865, and again, does the law of congress of July 26, 1866, become inoperative?

It is not claimed that the decision of any court, either in this Territory or California, has pretended to establish the doctrine of prior appropriation as here sought to be applied to agricultural lands.

Then there being no local custom, no local or statute law, and no decision of any court establishing the principle contended for, it is evident enough that no one can acquire any vested rights under and by virtue of the act of congress of July 26, 1866, for this act only claims to authorize and permit what is already established by the local customs, laws and decisions of courts.

Then how are the rights of these parties to be settled and determined? The act of the legislature of January 11, 1865, having been declared void by the supreme court and subsequently repealed by the legislature, and the act of congress of July 26, 1866, not applying to the case in any respect, we are necessarily compelled to look to the common law to settle the questions at issue. The common law is in force in this Territory, when not in conflict with the statute laws. In the Bannack statute, p. 356, it is enacted:

"That the common law of England, so far as the same is applicable and of a general nature and not in conflict with the special enactments of this Territory, shall be the law and rule of decision, and shall be considered as of full force until repealed by legislative authority."

We therefore have now arrived at a point in this investigation where we are authorized and required to go into an examination of the rights of riparian owners as at common law, and also to the applicability of that law to the wants, needs, circumstances and conditions surrounding the people of this mountain and mineral region; and it would not be

unsafe to say, that the common law, so sacred to every lawyer and jurist, and formed as it was from the customs, usages, habits and thoughts of a people of a different climate from our own, where the rains caused an abundance of moisture for farming and agricultural purposes, and the annual crops were produced and perfected without the aid of irrigation, cannot be followed in its strictness and its technicality in a country where the physical conditions and the nature of the climate renders it impossible. But if we can discover the reason of the law, and the principles upon which it was founded, and the natural wants and requirements of the people for whose prosperity and benefit the law was instituted and established, we have then a foundation from whence, by analogy and deduction, we can apply the principles we have found to other peoples, surrounded by other and different circumstances, wants and conditions. And so the principles and the reason of the common law adapts itself to every climate, and to the physical conditions of every country, as dictated by the natural wants of the people in whose behalf the law is invoked.

If the common law cannot be taken as authority from whence the rights of these parties are to be eliminated and determined, then we have no law on the subject, and neither of the parties here have any definable rights in the premises. But we hold that the common law is applicable to the case in hand, and that it settles and determines the rights of the parties to this litigation justly and with explicit certainty. The common law declares that a stream begins at its source where it comes to the surface, and the owners of lands adjoining it have a natural right to the use of the water from its source to its termination.

We maintain this as the established uniform doctrine of the common law: that a water-course is essentially a part of the freehold through which it passes, and the authorities abundantly uphold this position. We will cite a few of them:

"A river or stream, of common right, belongs to the proprietors of the land between which it runs, to each that part

nearest the land, and this rule is mainly derived from the fact that the riparian proprietor is the owner of the soil under the water, and by the general law of property becomes entitled as of right to all accessories. And therefore it is that a grant of land conveys to the grantee not only the field or the meadow, but all growing timber or water, standing or being thereupon, and thus it is that a stream of water becomes the property for certain uses of the owner of the soil over which it passes. It has therefore been held that the right to a water-course is a part of the freehold of which no man can be disseized but by due process of law." Ang. on Water-Courses.

"The owners of water-courses are denominated by the civilians *riparian proprietors*, and the use of this term is now fully introduced into the common law. The soil of the bed of the stream, and consequently the water, may be, and most often is, divided between the two riparian owners; that is, the land on one side may be owned by one person and on the opposite side by another; when such is the case, each proprietor owns to the middle of the stream. There is but one difference between the stream running through a man's land and one which runs by the side of it; in the former case he owns the whole and in the latter but half." *Starr* v. *Chiel*, 20 Wend. 149.

"If the proprietor of a large tract of land through which a stream of water flows sells parcels thereof above and below him, each grantee would take his parcel with full right to use the flowing water on his own land, subject to the same rights as proprietors above him." Ang. on Water-Courses.

"It is a settled principle of law, that owners of lands on the banks of fresh water rivers, above the ebbing and flowing of the tide, has the exclusive right of fishing as well as the right of property opposite their respective lands, *ad filum medium aquæ*. And, when the lands on each side of the river belonged to the same person, he had the exclusive right of fishing in the whole river, so far as his land extended along the same." 3 Kent, 411.

Land, says Lord Coke (4 Co.), in legal signification, com

prehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, fruses and heath. *Terra est nomen generalissimum et comprehendit omnes species terræ.*

"The only mode by which a right of property in a water-course above tide water can be withheld from a person who receives a grant of the land, is by a reservation directly expressed or clearly implied to such effect. If the intention of the grantor is not to convey any interest in the water, or any portion of it, he can exclude it by the insertion in the instrument of conveyance, of proper words for the purpose of so doing; but, in the absence of such words, the bed and consequently the stream itself passes by the conveyance." Ang. on Water-Courses.

"The uses of the waters of private streams belong to the owners of the land over which they flow. They are as much individual property as the stones scattered over the soil." 10 Ohio, 297.

"A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseized but by the lawful judgment of his peers or by due process of law." *Gardner* v. *Village of Newburg*, 2 Johns. Ch. 166.

In a note to *Ex parte Jennings*, 6 Cow. 543, it is held: "The general distinction, deemed of so much excellence and importance by the learned judges, and which at this day no lawyer will hazard his reputation by controverting, is, that rivers not navigable, that is, fresh water rivers of what kind soever, do of common right belong to the owners of the soil adjacent to the extent of their land in length; but that rivers where the tide ebbs and flows belong, of common right, to the State; that this ownership of the citizen is of the whole river, viz.: the soil and the water of the river."

In *Wadsworth* v. *Tillotson*, 15 Conn. 372, speaking of water-courses, the court say: "This right is not an easement or appurtenance, but it is inseparaby annexed to the soil, and is parcel of the land itself."

"The right to flowing water is now well settled to be a right incident to property in the land." *Elliott* v. *Fitchburg Railroad Co.*, 10 Cush. 193.

In *Johnson* v. *Jordan*, 2 Metc. 239, speaking of flowing water, the court say: "It is inseparably annexed to the soil and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it, and disuse cannot destroy or suspend it." In *Page* v. *Williams*, 2 Dev. & Bat. 55, the court say: "The common right here spoken of is not that existing in all men in respect to things *publici juris*, but that common to the proprietors of the land on the stream. And as between them the use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of land on the stream, he can enjoy on his own land and as appurtenant to it." In *Davis* v. *Fuller*, 12 Vt. 190, the court say: "The owner of land has rights to the use of a private stream running over his land peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he cannot be deprived by the mere use or appropriation of another, but only by grant, or by the use or occupancy of another for such length of time as that therefrom a grant may be presumed." For further authorities upon this subject, we refer to the case of *Vansickle* v. *Haines*, 7 Nev. 257.

The water in a stream thus becoming a part of the freehold itself, and passing with the freehold as incident to it, to whom does this water belong in streams upon the public domain, before the government has parted with its title? It will not be denied that it belongs to the government, and that when it conveys a title to the land, the waters flowing over or through the land pass with the grant, and the grantee thereby requires all the rights and all the title of the government.

The right to the waters of a flowing stream thus becoming a part of the freehold and passing with the land, to

what uses can each proprietor put the water as it flows through his land?

By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has the right to use it for any purpose, or what may be deemed an extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purposes of a mill, or divert the water for other purposes, but he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury. 12 Moore's P. C. 156. In other words, each riparian proprietor has the right to use the water of the stream to quench his thirst, for culinary purposes, and for the use of his cattle, and this, although such use may injure the proprietor of the lower estate, and he can use the water for other and speculative uses if he does not thereby interfere with the flow of the stream, or diminish its quantity or quality.

Thus speaks the law in a country where the rains sufficiently moisten the earth to produce and ripen the fruits thereof, and where irrigation for the purposes of agriculture is unknown, and it will be observed with what zealous care the streams and water-courses are guarded and protected, and the reason for this care is, the fact that the waters of a flowing stream, as it enters the lands of the different proprietors, and while it remains thereon, becomes a part of the freehold, and as it is supposed to be used to support and sustain life, and derives its value from this important use, the law declares that it must enter the lands of each proprietor, through which the stream passes, undi

minished in quantity, and so pure and unpolluted as to be fit for the primal use and purpose.

Now, it must be kept steadily in mind that the common law upon this subject is the law of this Territory, so far as the same is applicable to our peculiar situation and circumstances. And following the reasons and the analogies of the common law, we ask to what uses may the waters of a stream be applied by the riparian proprietors thereof, who are engaged in the pursuits of agriculture and farming, in a dry and arid country, where the scarce rains do not sufficiently moisten the earth, and irrigation is necessary to the successful production of crops? We must remember that water, by the general law, can be used to sustain life and for domestic uses by each owner of the land through whose land the stream passes; that is to say, it can be applied to the uses which are absolutely necessary for the well-being and civilization of society. And we say that, in the country we have described, with such necessities and conditions, and in the agricultural districts thereof, this proposition can be successfully maintained: that water for the purposes of irrigation naturally belongs to each riparian proprietor in certain quantities, as water for culinary purposes belongs to such proprietor at common law. Evidently the proportions and the quantity of water that can be thus used should be clearly and absolutely defined by appropriate legislation or by common consent, which would soon grow into a custom having the force and effect of law. Unless the common law can be thus modified and extended (if such use of water is a modification of that law), irrigation for agricultural purposes would be absolutely prohibited, for the common law is the only law in force here upon the subject, and no modification of the common law is required in order to authorize the use of water in a flowing stream by the riparian owners thereof for the purposes of irrigation.

Water for the purposes of irrigation in this country is equally necessary as water to sustain life. They are terms implying the same thing. The resources of the country cannot be developed, and our valleys cannot be reclaimed

and become inhabited, unless the waters of the streams can be used in an equitable manner, to cause the earth to bring forth its fruits.

So, then, we say that water for irrigation in this country as naturally belongs to the lands through which the stream passes, in certain proportions as in other countries it belongs to the land to supply the necessities of life. Irrigation in this country is what rain is to other countries, and a monopoly of one would be equally as appropriate as that of the other, and equally sustained by any principle of justice and equity. As in other countries, the rains come to the prior and to the subsequent locators of lands upon a stream in equal proportions, so in this arid country should the waters of any given stream be divided equally among the farmers for the purposes of irrigation.

The law in aid of justice and equity must conform to the peculiar and unusual conditions surrounding each country where it is administered, and the farming interests of this Territory can only be crowned with success when a fair and equitable distribution of our scarce waters is accomplished.

Let us examine the doctrine in an agricultural community, as the same is applied to mining districts, that the first appropriators of the waters of a stream acquire an absolute property therein as against every one, and that they can hold the same as against all subsequent appropriators thereof, and as against the government when it comes to sell its lands lower down the stream.

In the first place, this doctrine leads to a monopoly of water, which, in the language of one of the witnesses in this case, "is more precious than gold." An illustration may be useful. Suppose that ten men own each a farm of one hundred and sixty acres, upon the banks of a stream, whose volume is three thousand two hundred inches of water, and with ditches appropriate the waters of such stream. If two inches of water is necessary for the successful irrigation of one acre of land for the season or three hundred and twenty inches for one hundred and sixty acres, each man would be entitled to three hundred and twenty inches, or ten men

to three thousand two hundred inches. And if each of these men, year after year, should not wish to cultivate but sixty acres of their land, or six hundred acres altogether, yet they would hold the two thousand inches of water they did not use; and if subsequent locators above them on the stream should attempt to appropriate any of the waters thereof, an injunction would restrain them from so doing, and thus one thousand acres of land would be lost to cultivation.

The prior appropriator, by virtue of this doctrine, can hold sufficient water to irrigate the land he locates, and if he takes up one hundred and sixty acres of land, he can also appropriate sufficient water to irrigate the same, and yet he may not in fact, and may never intend to cultivate more than one-third of his land. Can the subsequent appropriator of water, or the subsequent locator of land along the banks of a stream, be deprived of the use of water in this manner, and especially in a country like this, where every drop of water should be made available for the purposes of agriculture and farming?

Is it not the true policy of this Territory to erect such a system of laws here as shall distribute our short supply of water to the best advantage to all our people? The common law applied to this country is ample and sufficient to secure this much desired end.

An examination of this doctrine of prior appropriation, and the rights thereby supposed to accrue, as it affects the interests of the general government, may not be out of place. The United States is the original proprietor of the soil, and as such has the right to make a final distribution thereof. This is a sovereign prerogative inherent in every government. The proceeds of the sale of the public lands is a fruitful source of revenue to the government, not only as to the amount received, but in a much larger sense; in extending the area of our civilization and opening up to our ever-increasing population cheap lands for cultivation and improvement. Now, if the doctrine of prior appropriation is to prevail, this consequence must inevitably result:

A few men will locate their farms near the mouth of a stream and appropriate the waters thereof, and any subsequent locators up the stream would be guilty of a trespass if they undertook to use any of the waters thereof, and an action could be prosecuted and maintained against them. The result is, that thousands of acres in our valleys must remain barren deserts, while, with an equal and just distribution of water, all might be cultivated. Thus the prior appropriator renders vast tracts of land utterly worthless, and their sale is lost to the government and their cultivation to the people. Such a doctrine is against public policy and cripples the life of the industries of the Territory.

The doctrine of prior appropriation goes to the extent of declaring that he who first appropriates the waters of a stream upon the government lands thereby acquires an absolute property therein, as against all the world, which property is capable of being bought and sold, mortgaged, devised, inherited and transmitted, from generation to generation, like other property. We maintain just the contrary, and say that the title to water thus appropriated still remains in the government notwithstanding such appropriation; and that the government, when it conveys its title to a purchaser, conveys a title to the land, and a title to the stream of water passing through it, as incident thereto, and as a part and parcel of the freehold, and that no appropriation in any manner affects the ability of the government to convey its title.

Let us suppose that A, by means of a ditch, appropriates the waters of a stream, and that he is the first appropriator thereof. It will not be denied that the government was once the owner of this water, and that it still owns the same will not be denied, unless by reason of some grant or license it has parted with its title; but no such conveyance is claimed, and the whole claim is, that the locator takes up, appropriates and converts to his own use the waters of the stream, which water is confessedly the property of the government, while yet the government is absolutely passive in the matter; the meaning of which is, that the appropriator simply converts to his own use and benefit the property of

the government. Such conversion does not change the title to the property and it still remains in the government. The government being thus the owner of the water as well as the soil through which it flows and passes, and having the right to sell and dispose of the same, absolutely and without condition, when it comes to sell to a subsequent locator upon the supposed stream, what interest does the purchaser thereby acquire? What rights does the grantee thereby succeed to? Does he obtain by his purchase the bare soil and no title or interest in the water flowing through it? It must not be forgotten that the stream of water is an incident to the land, and is a part and parcel of it, and we say a purchaser under such circumstances from the government takes all the title of the government. The purchaser succeeds to all the rights of the grantor. If so, an inquiry into the rights and the title of the government in the premises is in point. That the government is the absolute owner of all the public lands to which the Indian title has been extinguished is a proposition so clear and certain that a reference to authorities seems to be unnecessary. That it can sell and dispose of such lands, and thereby convey a perfect title, and that it can protect and defend such property against any and all trespasses and wrongful acts, is equally certain and beyond question.

In the case of *Vansickle* v. *Haines*, before referred to, the court say: "It is a proposition universally admitted that the United States is the unqualified proprietor of all public lands to which the Indian title has been extinguished. Certainly there is none other who has any right to or claim upon it which in any way qualifies the right of the federal government. Although it has sometimes been suggested that the unoccupied lands belonged to the several States in which they may be located, the suggestion has never received the serious sanction of statesmen or the courts of the country. On the contrary, it is the universal language of the judges that the unqualified right of property is in the United States. 'The English doctrine in relation to real estate is that there can be no adverse possession against the

crown, nor against its grantee until there be a new entry after the grant. An entry on land belonging to the crown is held not to be a disseizin, but a mere intrusion on the king's possession. His possession is not thereby divested, but in legal contemplation still continues. The king, not being disseized by the entry, his conveyance of the freehold is good and his grantee is seized by virtue of it. The grantee succeeds to the rights of the crown, and cannot be disseized without another entry after the conveyance. The individual making the original entry acquires no new right by the conveyance, but only continues his old interest, and remains an intruder still, liable to be sued in trespass.' Bacon's Abr. 331.

'There can be no doubt but that the same principles are applicable to the government of the United States. It possesses the same right of sovereignty and prerogative in respect to the public lands. By the right of eminent domain it is the absolute and exclusive owner of all the public lands which it has not alienated or appropriated. It is seized of them to as full an extent as the British government can be of its domain. It cannot be disseized; no adverse possession is created by an entry on its lands. Possession thus acquired can never ripen into a right nor authorize any defense against the government. The government may treat the person thus in possession as an intruder and sue him in trespass. On the sale of lands by the United States the patent transfers to the purchaser the entire legal estate, and seizin to as full an extent as the government held them.' 2 Gilm. 651.

'It cannot be denied that all the lands in the Territories not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, in such modes, as the government may deem most advantageous to the public, or in other respects may deem most politic.' *Irvine* v. *Marshall*, 20 How. 561.''

The government thus being the owner of the absolute title to the public domain, it can protect the same against

any trespass thereon. *Jourdan* v. *Barratt*, 4 How. 185. "In this country the lands of the United States lying within the States are held and subject to be sold (under the authority of congress), as lands may be held and sold by individual owners, or by ordinary corporations, and similar remedies may be employed by the United States, as owners, that are applicable in cases of others." *Bagnell* v. *Broderick*, 13 Pet. 450. So the government may lease any portion of the public domain. *United States* v. *Gratiot*, 14 Pet. 526. And the government is entitled to the same remedies, to protect such lands, as individuals have to protect their lands. *United States* v. *Gear*, 3 How. 20; *Cotton* v. *United States*, 11 id. 231.

Then we are safe in saying that the government of the United States has an absolute property in the soil of the public domain, and in the waters flowing over or upon the same, and has a right to sell both, and the water flowing over, upon, or through such lands passes with the land, as incident thereto, and as a part and parcel thereof, and a purchaser takes the whole of the grantee's title, both as to the land and as to the water thereon.

In the case before us, both plaintiffs and defendants have acquired titles to their lands from the government, and when the title passed from the government to riparian owners, the rights acquired by prior appopriation, as applied to government lands while the title is yet in the government and the occupiers are mere tenants at will, is not applicable and falls to the ground. Conceding the fact, that the government retains the right to the final disposition of the soil and the waters flowing over the same, and this result must inevitably follow, and each purchaser from the government, of lands along a stream, acquires all the title of the grantor, and this title carries with it property in the soil and waters naturally flowing over the same. If this is not the case the prior appropriator takes title to the water as against the government.

We therefore conclude that the doctrine, that he who first appropriates the waters of a stream can hold the same

as against subsequent riparian owners, for the purposes of irrigation and agriculture, is inapplicable to lands situate along the banks of a stream where title to such lands has passed from the government to riparian owners, for the very act of transferring the title carries with it the freehold, and this includes a title to the water that flows over or along the boundary of the lands thus transferred; and the act of congress of July 26, 1866, is not at all in conflict with this view of the case. That act is applicable to rights acquired while the title yet remains in the government, and the occupiers are mere tenants at will; and then the doctrine of prior appropriation is only applied when the same is established and sustained by the local customs, laws and decisions of the courts, and we believe we have conclusively shown that there are no such local customs, laws and decisions in force in this Territory.

And it is safe to say that the territorial legislature has no power or authority to enact a law establishing the principle contended for by appellants. The organic act, section 6, in defining the powers of the territorial legislature, declares that "no law shall be passed interfering with the primary disposal of the soil," and, therefore, any law of the legislature that in any manner depreciates the value or worth of the soil, and the property of the United States therein, is such an interference with its disposal as would render any such law nugatory and void. And if the doctrine of prior appropriation, and the supposed rights incident thereto, as it manifestly does, causes the lands of the government to become utterly worthless, making it impossible to dispose of the same, where before the application of such doctrine or the accruing of such supposed rights said lands were valuable, such legislation would be in conflict with the rights of the United States, and a palpable violation of the organic act, and therefore void.

If this decision necessitates the adoption of the common law respecting running water, and the manner in which the same may be used and the rights incident thereto, we can see no objection to it on that account. It may operate un-

justly in certain peculiar cases, but as a general rule it will secure justice and equity. Whenever any old and long-established rule or principle of law is to be modified or changed, it should be done with the greatest care and prudence, for such rule or principle generally speaks the wisdom of long experience, much thought and much learning, and should not be inconsiderately trifled with. We believe our Territory should not form an exception to the just operation of the rules and principles that govern and control the rights and remedies incident to running water. We have arrived at this conclusion after much thought and study, having in view solely the interests of our people and the prosperity of the Territory.

In this connection, we desire to call attention to a late decision of the supreme court of the State of Nevada, as to the application of the common law to the waters of that State, and it is believed that this decision, and the principles and reasons thereof, are peculiarly applicable to this Territory. We refer to the case of *Vansickle* v. *Haines*, before cited. In that case the court say, in speaking of the applicability of the common law to running streams in the irrigating regions of that State: "It (the common law) is a rule which gives the greatest right to the greatest number, authorizing each to make a reasonable use of it (the water), providing he does no injury to the others equally entitled to it with himself; whilst the rule of prior appropriation here advocated would authorize the first person who might choose to make use of or divert a stream to use or even to waste the whole, to the utter ruin of others who might wish it. The common law does not, as seems to be claimed, deprive all of the right to use, but, on the contrary, allows all riparian proprietors to use it in any manner not incompatible with the rights of others. When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said that he has the right to *all* the water, for that would render the stream, which belongs to all the proprietors, of no use to any. What is meant is, that no one can absolutely divert the whole

stream, but must use it in such manner as not to injure those below him. As the right is equal in each owner of the land, because, naturally, each owner can equally enjoy it, so one must exercise that right in himself without disturbing any other above or below in his natural advantages."

The opinion rendered in the case at bar seems to be based upon the proposition, that water for the purposes of irrigation could not be taken from a stream, under the rules and regulations of the common law. We believe this is a mistaken notion. In the case of *Elliott* v. *The Fitchburg Railroad Company*, 10 Cush. 193, Chief Justice SHAW says: "The right of flowing water is now well settled to be a right incident to property in law; it is a right *publici juris*, of such character, that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land, and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such just and reasonable use may often be a difficult question, depending on various circumstances. * * * It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. * * That a portion of the water of a stream may be used for the purposes of irrigating land, we think, is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water-course, or take such an unreasonable quantity of water, or make such an unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably."

The foregoing principles are declared in many decisions, and we are therefore led to believe that at common law,

water for the purposes of irrigation, under the foregoing restrictions and limitations, can be taken from a stream and used to irrigate the lands through which such stream passes.

The decisions in California, which are relied upon to establish the doctrine of prior appropriation, are entirely inapplicable to this case, for those decisions were made in cases where the government yet owned the title to the land, and this fact was the controlling feature in the cases. In the case of *Irwin* v. *Phillips*, the court says: "It is insisted by the appellants that in this case the common-law doctrine must be invoked which prescribes that a water-course must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being, both at the civil and common law, that the owner of lands on the banks of a stream owns to the middle of the stream, and has the right by virtue of his ownership to use the water in its pure and natural condition. In this case, the lands are the property either of the State or of the United States, and it is not necessary to decide to which they belong for the purposes of this case," and the court shows that because the parties were not the *owners* of the soil the common-law rule did not apply. In the case of *Crandall* v. *Woods*, 8 Cal. 141, Justice MURRAY says: "Having thus stated the fundamental principles upon which this right is founded, it is evident that the only difficulty in the case arises: first, from the fact that the defendant is not the owner of the fee of the land, but that title to it is in the government of the United States." And the whole decision turned upon the fact that the title still remained in the government.

In the case at bar, the government has parted with its title, and the plaintiffs and defendants are the owners in fee of their respective parcels of land, and this fact controls the case and brings it within the common-law rule, as to the rights of the owners of lands along the banks of a stream.

The appellants in their argument invite us to look at the consequences to the public and to the Territory at large, if the strange decision of the court below is affirmed. We do not admire the practice of going outside the case to find arguments in support of a desired decision, and such arguments can have no weight here, for every citizen is entitled to his rights, as the law defines them, no matter what the consequences may be; and in such a case as this, and in no other case, can a citizen or a class of citizens be robbed of his or their rights, or of their property, in order to secure to the Territory an imaginary prosperity. But since this invitation has been given, and we are asked to go outside the case and look at the consequences of our decision, we will for one moment do so.

It is well known to any individual who has resided in this Territory for one season, that there is not sufficient available water in the Territory for the purposes of irrigation, and if the doctrine of prior appropriation, as contended for by appellants, is to prevail, long before one-tenth part of the tillable land in the Territory is subjected to cultivation the entire available water of the country will have been monopolized and owned by a few individuals, thereby defeating any advance in the agricultural prosperity of the country, and thereby directly repelling immigration thither. Even now, with a very sparse population, the contentions over water for the purposes of irrigation, and a monopoly thereof, furnish a fruitful source of litigation. And, in the future, when the scant supply of water shall have been all appropriated and owned by a few individuals, and our valleys shall have been drained of all their waters for the benefit of a few men, what is to become of the school lands of the Territory? By the munificent donation of the general government, sections 16 and 36 in every township in the Territory, making thousands upon thousands of acres in the aggregate, are reserved and set apart for school purposes. Here is laid the foundation for a fund that will be ample and sufficient for all time to come, to insure to every child of our Territory or State a thorough education. But if the school lands

can be drained of every drop of water, and if the water that naturally flows through or upon such lands can become the private property of the individual who happens to locate above or below these school sections, as the doctrine of prior appropriation would clearly authorize and permit, then the school lands of Montana would become of no value whatever. In such case they are not now, and never will be, worth one mill per acre. The doctrine of prior appropriation contended for makes our school lands a desert, and this magnificent donation to our children, and to all their posterity, is an inheritance of sand and sage brush — a barren, worthless desert.

What becomes of the railroad land grant through this Territory? Common fairness would dictate that we should not, by our courts or by the legislature, indirectly defeat vested rights. And if there is one thing more than another that we need to develop the untold resources of this country, it is a railroad. But if we destroy the land grant already given for the purposes of a road, or do what is equivalent thereto, make it worthless, can we hope that a railroad will be built? We might just as well repeal the law, giving any railroad in this Territory land, as to take the waters from such lands? The effect would be precisely the same as in either case, and either would forever cripple the prosperity of the Territory.

What says the government of the United States to the doctrine that renders the public domain of Montana utterly of no value? The doctrine of prior appropriation robs the general government of its property, by making the government lands of no value. And all these consequences, so disastrous in any view, are to be visited upon Montana, that a few individuals may have what does not now, and never did, belong to them.

Judgment affirmed.

TAYLOR et al., appellants, *v.* HOLTER et al., respondents.

DEED — *description of property — fork of gulch — parol evidence.* Parol evidence is not admissible to show that the grantors in a deed, in which the property is described as "all the water of the right-hand fork of Oro Fino gulch," intended to convey the water of the left-hand fork of the same gulch.

CASE AFFIRMED. The case of *Donnell* v. *Humphreys*, *ante*, 514, holding that parol evidence may be offered to locate the deed upon land conveyed, affirmed.

DEED — *breach of warranty — measure of damages.* The measure of damages against grantors, who have warranted the title and agreed to defend the same in the deed, is the value of the property at the time the conveyance is made and interest thereon, and the necessary costs, expenses and reasonable counsel fees incurred in defending the title.

DEED — *consideration — damages — gold dust — dollars.* In an action to recover damages for the breach of warranty in a deed, the consideration of which is "two thousand dollars in clean gulch gold dust," only $2,000 in currency can be collected as damages for the value of the consideration.

DEED — *interpretation — consideration — words of bargain and sale.* The words "remised, released and quit-claimed" in a deed, in which the consideration is the full value of the property, and the grantors have warranted the title, are words of bargain and sale, which convey the property described.

TRUSTEE — *liability for personal warranty of title.* The grantors of a warranty deed, who held the title as trustees for a third party, to whom the consideration was paid, are liable on their personal covenants in the deed.

DEED — *acknowledgment.* A deed which is not acknowledged or recorded is good between the parties.

Appeal from the Third District, Lewis and Clarke County.

THE court, WADE, J., granted a nonsuit in this case. The facts are stated in the opinion.

E. W. & J. K. TOOLE and CHUMASERO & CHADWICK, for appellants.

Appellants should have been permitted to introduce their testimony to explain and interpret the description in the deed of respondents. Prominent landmarks are controlling points as to description. In this case the monuments are fixed and certain, and the actual possession of the identical property was delivered by respondents. *Nourse* v. *Lloyd*, 1 Penn. 229; *Frost* v. *Spaulding*, 19 Pick. 445; *Moss* v.

Shear, 30 Cal. 479; *Waterman* v. *Johnson*, 13 Pick. 261; *Owen* v. *Bartholomew*, 9 id. 520; *Donnell* v. *Humphreys*, *ante*, 514; *Jackson* v. *Loomis*, 18 Johns. 81; *Reamer* v. *Nesmith*, 34 Cal. 624; *Vance* v. *Fore*, 24 id. 446; *Irwin* v. *United States*, 16 How. (U. S.) 522.

The deed of respondents is the same as that of bargain and sale. The grantors intended to convey the estate without any limitation or reservation. The deed supports the covenant of warranty attached to it. The warranty would be without meaning unless the deed is construed as claimed by appellants. The intention of the grantors must govern. The deed does not convey any right, title or interest, but the property itself. 1 Coke on Lit. 60, 266; 4 Kent, 458, 460; *Russell* v. *Coffin*, 8 Pick. 150; *Lynch* v. *Livingston*, 2 Seld. 434; *Jackson* v. *Root*, 18 Johns. 78; *Morrison* v. *Wilson*, 30 Cal. 347; 2 Pars. on Cont. 184, 185; *McNear* v. *McComber*, 18 Iowa, 12; *Williamson* v. *Test*, 24 id. 138.

The measure of damages in this case is the consideration money paid by appellants with legal interest thereon, the value of the improvements placed on and in connection with the property conveyed in carrying out the object of the grant, the costs of the suit in which appellants were evicted, and the fees paid appellants' attorneys for defending such suit. Sedgw. on Dam. 174; *Gore* v. *Brazier*, 3 Mass. 542; *Caswell* v. *Wendell*, 4 id. 108; *Bigelow* v. *Jones*, id. 513; *Sterling* v. *Peet*, 14 Conn. 254.

When it appears from the deed that the grantor knows that the grantee is buying land to place valuable improvements thereon, and there is a breach of the covenant of warranty in the deed, the grantee will be entitled to recover the sum expended in placing such improvements on the land. *Pitcher* v. *Livingston*, 4 Johns. 6; *Dimmick* v. *Lockwood*, 10 Wend. 149; *Staats* v. *Ten Eyck*, 3 Cai. 111; Sedgw. on Dam. 174; Rawle on Cov. 95–100; *Sterling* v. *Peet*, 14 Conn. 254.

Respondents are bound by their personal covenants in the deed. Their character as trustees does not affect their liability in this action. Respondents did not disclose their

trust. Hill on Trust. 790; *Greason* v. *Keteltas*, 17 N. Y. 491.

SHOBER & LOWRY and W. F. SANDERS, for respondents.

The contract sued on is a release and not a conveyance. It does not convey any thing. It is not acknowledged. Acts 1865, 479, §§ 80–88. The deed does not furnish the foundation of an action.

The testimony offered by appellants was not competent. Appellants wished to prove that while one water-right was described in their deed, another was conveyed, from which they had been disseized. The property was described by the laws of nature.

The deed simply abandoned to some one the property. The form of expression in the deed is the lowest that can be used in transferring an estate.

Appellants took by the release the interest of respondents in the property. The covenant of warranty does not enlarge the estate conveyed, and affects only the interest that is conveyed. The deed warrants that the estate actually possessed by respondents is completely extinguished. We have no statute of uses, and the New York decisions, cited by appellants, do not apply to the release in this case. 2 Chitty's Black. 260, "Release;" *Gee* v. *Moore*, 14 Cal. 472; *Kimball* v. *Semple*, 25 id. 452; Acts 1865, 487, § 50; 3 Washb. on Real Prop. 404; 4 Kent, 283; Ohio Dig. 310–316; *Sweet* v. *Brown*, 12 Metc. 175; *Blanchard* v. *Brooks*, 12 Pick. 47; *Powers* v. *Ware*, 2 id. 458.

The complaint of appellants does not therefore state facts sufficient to constitute a cause of action.

Appellants seek to vary the terms of the deed by oral testimony, and prove a liability that their pleadings show did not exist. Such evidence is inadmissible. No action can be maintained for a failure of title of a fork of a stream that was not actually embraced in the deed. *Tymason* v. *Bates*, 14 Wend. 672.

WADE, C. J. This is an appeal from a judgment of nonsuit in the court below. The suit was brought to recover

damages for breach of warranty in a deed from defendants to plaintiffs, conveying a certain water-right situate in Oro Fino gulch, Lewis and Clarke county.

The deed in question is in the words and figures following, to wit:

"This indenture made the fifth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, between Edward M. Hoyt and A. M. Holter, of Helena, Lewis and Clarke county, Montana Territory, parties of the first part, and Jesse Taylor, Jeremiah Smith and George Cleveland, parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of two thousand dollars, clean gulch gold dust, to them in hand paid by said parties of the second part, the receipt whereof is hereby acknowledged, hath remised, released and quit-claimed unto the said parties of the second part, and to their heirs and assigns, all that certain water-right lying and being in the county of Lewis and Clarke, Montana Territory, and bounded and particularly described as follows, to wit: A certain water privilege the right of which is now vested in us, described as follows: All the water of the right-hand fork of Oro Fino gulch, at and above a point upon said right-hand fork, where the head of a ditch will strike it, which will convey the waters of said right-hand fork of said Oro Fino gulch into a ditch now owned by Taylor, Smith and Cleveland, conveying the waters of the left-hand fork of Oro Fino gulch into Tucker gulch; said point is supposed to be near some cabins about a quarter of a mile above Unionville. The said water-right hereby conveyed, including the right of the said parties of the second part, at any time they may see proper to carry and convey the said water of the said right-hand fork of said Oro Fino gulch to Tucker gulch, or such other gulch or gulches or mining ground as the said parties of the second part may elect to carry the same, to be by them used or disposed of to their sole use and benefit; together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining: and the reversion and rever-

sions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest we now have in said property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances unto the said parties of the second part, their heirs and assigns forever, and we hereby covenant and agree to warrant and defend the title to the same against all claims of all persons whomsoever, whether in law or equity.

In witness whereof the said parties of the first part hath hereunto set their hands and seals the day and year first above written.

EDWARD M. HOYT, [L. S.]
A. M. HOLTER. [L. S.]

Signed, sealed and delivered in presence of Amos T. Laird.

TERRITORY OF MONTANA, *County of Lewis and Clarke,* } *ss.:*

On this 5th day of December, 1868, personally appeared before me, A. B. Babcock, of the aforesaid Territory, Edward M. Hoyt and A. M. Holter, and acknowledged under oath that they and each of them signed and jointly did execute the within instrument, of their own free will.

A. B. BABCOCK,
Notary Public.

Upon the trial of the cause to a jury, the plaintiffs, to maintain the issues on their part, offered the foregoing deed in evidence, and the same was received, and read to the jury. It will be seen that this deed is a conveyance of all the waters of the *right-hand fork* of Oro Fino gulch. The plaintiffs then asked the following question of the witness Taylor, one of the grantees in the deed. "What was intended by the term right-hand fork of Oro Fino gulch?" Which question was objected to, and objection sustained. The

plaintiffs then proposed to prove, by competent witnesses, that the plaintiffs became the owners of the right-hand fork of Oro Fino gulch in the year 1866, as were so the owners thereof at the time of the making and execution of the deed from defendants to plaintiffs, on the 5th day of December, 1868; that said plaintiffs at that time were the owners of a ditch conveying the waters of same right-hand fork of Oro Fino gulch into Tucker gulch; that the cabins referred to in said description are situate on the left-hand fork of said gulch, about one-fourth of a mile above Unionville, and that immediately after the execution of the deed from defendants to plaintiffs herein set forth, an agent of defendants, the grantors in said deed, delivered to the plaintiffs, the grantees therein, the waters of the *left*-hand fork of said Oro Fino gulch, and other testimony of like character. To the introduction of which testimony the defendants objected, which objection was sustained; whereupon plaintiffs submitted to a judgment of nonsuit, and appealed to this court.

The object and purpose of this proof was to show that the grantors intended to convey, and the grantees intended to receive by virtue of the deed in question, the waters of the *left-hand fork* of Oro Fino gulch, instead of the waters of the *right*-hand fork, as described in the deed.

This question is presented for solution and decision. Can the words in a deed be altered or changed by extrinsic evidence? In other words, where parties have conveyed all the waters of the *right-hand fork* of a certain gulch or stream, is parol extrinsic proof admissible to show that they intended to convey all the waters of the *left-hand fork* of such stream?

The enunciation of a few general principles, as derived from the books and authorities, may be of use in arriving at a safe and satisfactory answer to the question proposed.

It has long been settled, that where parties have deliberately put their contracts in writing in such terms as import a legal obligation without uncertainty or ambiguity, as to the object, nature and extent of their agreements, it is con

clusively presumed that the whole of the contract was reduced to writing; and all oral testimony as to what was said before, at the time of, or after it is completed, is rejected because it would tend to substitute an oral for a written contract. This rule is not contradicted or varied by the fact, that extrinsic parol evidence is always admissible to give effect to a written instrument, by applying it to its proper subject-matter, by proving the circumstances under which it was made, thereby enabling the court to put itself in the place of the parties with all the information possessed by them, the better to understand the terms employed in the contract, and to arrive at the intention of the parties.

Instruments are to be interpreted according to their subject-matter, and parol evidence may be resorted to in order to ascertain the nature and qualities of the subject, as a just medium of interpreting the language of the parties, and, also, as a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract.

It is necessary to the validity of a grant that the thing granted should be capable of being distinguished from all other things of the kind, but it is not necessary that the description should be such as to identify the object without the aid of extrinsic testimony, and when the description alludes to facts beyond the deed, parol evidence may be offered, not to contradict the description, but to locate the deed upon the land. And this principle was the foundation of the decision in the case of *Donnell* v. *Humphreys*, *ante*, 514.

These rules and principles apply to the interpretation of instruments that are ambiguous and uncertain upon their face, as if I should convey to A my house and lot in Helena, and I was the owner of two houses and lots therein; parol evidence would be admissible to show which of the two houses I intended to convey. But if I conveyed my brick house on Main street, can parol proof be introduced to show that I intended to convey my wooden house on Rodney street?

The description contained in the deed in question is not in any sense ambiguous or uncertain. It is "all the water of the right-hand fork." This is direct, simple and plain. Can we go outside of the deed and create an ambiguity, and then apply the language used to a subject entirely different and directly contradictory to the subject mentioned in the deed?

It is believed that the following is the true rule upon the subject, which rule is gathered from a review of the authorities upon the question, so far as we have been able to read them: The intent of the parties must be gathered from what is written rather than from parol evidence, but the language of the instrument may be construed by the light of surrounding circumstances, and, so far as possible, the court may put itself in the place of the parties, and may interpret the language from this stand-point, *but nothing can be added to or taken from the written words.*

When it is said that courts may put themselves in the place of the parties, and interpret the language used by the light of surrounding circumstances, it is necessary, in the first place, that such language be ambiguous and uncertain; and, in the next place, no interpretation can be given whereby the language can be altered or changed.

If the language is ambiguous it may be shown what is intended, but this intention, when so shown, shall not contradict, change or vary the language used. The language of the instrument shall be applicable to the intention shown by parol.

If this rule is sustained by the authority, then parol proof never could be introduced to show that a grantor intended to convey the "*left-hand fork*" when he did, in fact, convey the "*right*-hand fork."

One of the leading cases referred to by appellants' counsel is that of *Reamer* v. *Nesmith*, 34 Cal. 624. The description contained in the deed in this case was as follows: "All that certain piece of mining ground situate in Comer's Field, on Swindle Hill, south of the road leading from Yanke- Jim's to Todds' Valley, known as the Booth claims,

and marked by stakes and corners, four hundred feet front, more or less, *running back into the hill.*"

It will be seen that, although there are many calls in this description, it finally reaches this said claim known as the Booth claims, marked by stakes and corners, and four hundred feet front, more or less, and running back into the hill. And the court say: We are unable to perceive why this description is not applicable to the ground, and sufficiently certain for all purposes of description. But one of the chief questions determined in the case was, whether parol proof was competent to show what was meant by the terms known as the "Booth claims," and "running back into the hill." These terms and phrases are ambiguous and uncertain; and the court very properly say, that it was competent to show the intention of the parties in using these words. But we hold that no intention could be shown that would destroy the words themselves. The words being ambiguous, extrinsic evidence can apply them to their proper subject, and, when so applied, the words must still be applicable to that subject. And, although this is true, yet it would not be true that proof could be introduced to show that the parties, when they said the claim known as "Booth's claim," intended John Smith's claim, or when they said "running back to the hills," they intended to say running forward to the river. The case does not support the proposition that parol extrinsic evidence can be introduced to explain the terms of an unambiguous deed, and to make parties say the "right-hand fork" when they intended the "left-hand fork."

Neither is the proposition supported by the case of *Jackson and McNaughten* v. *Loomis*, 18 Johns. 81, where, in a deed, the premises were described as lot No. 51, in the second division of a patent bounded as follows: Beginning at a stake and stones, etc., giving monuments, courses and distances. It was proved that the grantor at the time of the conveyance owned lot No. 50, in the same patent, and that the monuments, courses and distances exactly correspond with those found on the land, and that, unless this was con-

veyed by the deed it would be inoperative and of no effect. The court held that the words "lot No. 51" might be rejected as surplusage, the description of the premises being sufficiently certain without these words; that if there is a contradiction in a description, that part of it is to be taken which gives most permanence and certainty to the location. This simply decides that where land is described by monuments, courses and distances, these shall control, instead of the number of the lot, and that a false number may be rejected as surplusage. But suppose we undertook to reject the words, "right-hand fork of Oro Fino gulch" in the description under consideration; it cannot be done without utterly destroying the deed, unless we supply other words, and no words can be added to or taken from a description by virtue of extrinsic evidence. Strike out the words "right-hand fork," and nothing is conveyed, and the deed is a nullity.

So in the case of *Irwin* v. *The United States*, 16 How. 52[9], the description contained in the deed was as follows: "The right and privilege to use, divert and carry away from the fountain spring, etc., by which the woolen factory of grantors is now supplied, so much water as will pass through a pipe or tube of equal diameter with one that shall convey the water from the said spring upon the same level therewith to the factory of said grantors." The court held that, under and by virtue of this description, the grantors were entitled to one-half the waters mentioned, and this decision is perfectly consistent with the words used; and, following the words of the description, no other decision could have been arrived at.

The view of the law, as herein intimated, is most forcibly expressed in the case of *Tymason* v. *Bates*, 14 Wend. 672. In this case the court says: "The deed describes the boundaries of the premises conveyed as beginning at the southeast corner of lot number sixty, in the line of *Lindsay* and Roseboom's tract. The existence and location of this line is not in this case the subject of dispute, but the question proposed to be evolved is, whether the parties to the deed

meant to refer to what is proved to be the true line, or to another line which they supposed to be the real line of Lindsay and Roseboom's tract, but which in fact was not." And the court proceeded to solve the question by saying that what the parties intended must be ascertained by what is expressed in the deed. If, however, their intention is not expressed in the deed, extrinsic evidence must be resorted to, to supply that which the instrument does not supply.

But in the case at bar, the intention is fully and clearly expressed to convey the waters of the right-hand fork of Oro Fino gulch, and as in the case of *Tymason* v. *Bates*, there is no ambiguity in the expression used, nor any thing in the deed to show that the parties did not mean exactly what they said.

The case under consideration must be distinguished from the numerous cases cited in the books where these were uncertain, contradictory or ambiguous descriptions, wherein it is decided that if there are certain particulars once sufficiently ascertained which designate the thing intended to be granted, the addition of a circumstance, false or mistake, will not frustrate the grant, but may be rejected as surplusage, and so if the language used is ambiguous it may be explained, but when explained it must verify the intention so proved by extrinsic evidence. The true rule is, *to give effect to the intention of the parties if the words they employ will admit of it.* But if the words used, by their clearness and certainty, absolutely forbid the aid of extrinsic evidence in their interpretation, it would be changing the *certain written contract* of the parties to let in outside parol proof.

Parties must contract for themselves, courts cannot make contracts for them, and the rules of interpretation are utterly unavailing to aid a contract or agreement that is specific and certain in its terms, and clearly speaks what the parties intended it should. If parties convey the right-hand fork of Oro Fino gulch, courts nor witnesses cannot say they thereby intended the left-hand fork. As well might they

say they intended the left fork of the Missouri river, or the north fork of the Yellowstone, and all the circumstances and surroundings of the parties, however plausible they may appear, cannot blot out the language of the deed and supply other language in its place. Such circumstances and surroundings may aid the language but cannot destroy it. They can apply the deed to its proper subject, and when thus applied, the language must describe such subject, and be entirely consistent with it. The language must control and not the circumstances. The written words must stand and no parol proof can destroy them.

The proposed testimony by virtue of the introduction of which it was offered to be proven that where the parties used the term right-hand fork in the description they in fact intended the left-hand fork, was properly rejected, and the judgment of the court below is affirmed.

And here this decision might properly close, but many questions of grave importance were argued and determined in settling the pleadings in the case, which so vitally affect the rights of the parties herein, that we feel called upon to review those decisions.

And first, the defendants made a motion to strike out certain portions of the complaint, by which motion the question of the measure of damages in a suit for breach of warranty in a deed was presented.

At common law, upon the ancient covenant of warranty, upon voucher or writ of *warrantia chartæ* the demandant recovered of the vendor other lands of equal value with the lands from which the vendee or feofee was evicted, and the value was computed as it existed when the warranty was made, and the warrantor was not held to pay for the increased value of the lands. And when the personal covenants of warranty were introduced, this established measure of compensation was not varied or changed.

In this country upon a covenant of seizin and the right to convey, the rule in all the States seems to be the value of the lands at the time of the conveyance, and interest and costs. I believe this rule usually obtains in the United

States wherever the question has been adjudicated, and I do not understand counsel to dispute this proposition. But upon the covenant of warranty and for quiet enjoyment, there is a conflict of authority, upon the measure of and amount of damages that may be recovered for breach of the covenant. In the covenant of seizin the breach occurs at the time of the conveyance, it is broken as soon as it is made, and this is the reason assigned for the rule, that the measure of damages shall be the value of the land at the time of the breach.

In a covenant of warranty or for quiet enjoyment, for they are the same in their legal consequences, the covenant is not broken until eviction, and the effort has been made in such cases to measure the damages by the value of the lands at the time the covenant is broken, in analogy to the rule in covenants of seizin, and hence the question as to the increased value of the land by the natural rise thereof or by way of improvements.

It is difficult to discover any substantial reason why the rule should not be the same in both classes of covenants. These covenants in either case express the contracts, or the intention of the parties, and where the parties act in good faith, it does not look like exact justice to say that A, who takes possession of lands under a covenant of seizin, and makes valuable improvements thereon, upon being dispossessed by the real owner shall receive as damages only the value of the lands, at the time they were conveyed to him and interest, while B, who takes possession under a covenant of warranty, shall receive the value at the time he is evicted. The reason assigned for the difference is a purely technical one, and is arrived at by saying, that in the case of a covenant of seizin the contract is broken as soon as it is made.

We propose to examine the authorities upon the measure of damages in covenants of warranty and for quiet enjoyment, and to arrive at what departures in the rule, if any, have been made as applied to covenants of seizin.

The question came up in the State of New York in 1805, in the case of *Staats* v. *Ten Eyck*, 3 Cai. 111. The

nants in Ten Eyck's deed were of seizin and for quiet enjoyment, and the question was whether the plaintiff was entitled to recover the value at the time of eviction, or at the time of the purchase and to be ascertained by the consideration given. KENT, C. J., decided that the rule at common law was that the demandant recovered compensation only for the land at the time the warranty was made, and that the law had not been altered since the introduction of personal covenants. LIVINGSTON, J., concurred in this opinion, and without deciding what ought to be the rule where the estate has been improved after purchase, he held that the plaintiff ought to be re-imbursed the costs sustained in the action of ejectment.

In a subsequent case (*Pitcher* v. *Livingston*, 4 Johns. 1), the covenants were of seizin and for quiet enjoyment, and the question was presented whether the plaintiff could recover damages for improvements made by him and the increased value of the land. Upon the question as to the increased value of the land, all the court concurred in the opinion in the case of *Ten Eyck's Executors*, and the majority of the court decided that there could be no recovery for the improvements. SPENCER, J., dissenting therefrom and delivering a dissenting opinion. These decisions have been followed in the State of New York, and in that State the law may be considered settled, and the same rule prevails in the States of Pennsylvania (*Brown* v. *Dickenson*, 12 Penn. St. 280; 4 Dall. 444; 8 Serg. & Rawle, 166); North Carolina (*Phillips* v. *Smith*, 1 N. C. L. R. 475); Georgia (*Davis* v. *Smith*, 5 Ga. 285); Kentucky (2 Bibb, 279); Arkansas (1 Pike, 323); Iowa (1 Greene, 28); Ohio (14 Ohio, 118); Virginia (2 Leigh, 463); Tennessee (4 Humph. 101); New Jersey (2 Harr. 304); and South Carolina (2 Nott & McCord, 189).

The same rule prevails in the supreme court of the United States. *Hopkins* v. *Lee*, 6 Wheat. 118.

Opposed to the rule adopted in these States, and adopting the rule that the measure of damages in the case proposed is the value of the lands with the improvements at

the time of the eviction, are the States of Massachusetts (*Gore* v. *Brazier*, 3 Mass. 523); Connecticut (Kirby's R. 3; 14 Conn. 204); Vermont (12 Vt. 387); and Maine (527).

PARSONS, Ch. J. (in *Gore* v. *Brazier*), said: "When lands were aliened for money, when improvements in agriculture became an important object of public policy, and when the alienor might have no other lands to render a recompense in value, it became expedient that another remedy for the purchaser on eviction should be allowed. And it is certain that, before the emigration of our ancestors, the tenant, on being lawfully ousted by a title paramount, might maintain a personal action of covenant broken on the real covenant of warranty."

Upon this conflict of authority in the different States we are called upon to determine where the true rule is to be found, and it is our opinion that the weight of authority preponderates in favor of the rule that the measure of damages, where no other consideration intervenes, is the value of the lands at the time the covenant is made, and interest and the necessary costs incurred in defending the title.

The rule we have indicated must prevail where there is nothing in the deed to show a different intention. The contract or covenant of warranty must be construed like any other contract by arriving at the intention of the parties, and where there is any thing peculiar in the deed to indicate what the parties intended by their contract, that declared intention ought to prevail over any arbitrary rule of law. If the vendor, at the time of the alienation, knows the particular purpose to which the vendee intends to put the property he ought to be said to make the conveyance with reference to that purpose.

There are intimations running through all the authorities that the contract of warranty must be construed like any other contract by arriving at the intention of the parties, as if A buys of B a city lot for the purpose of erecting a dwelling-house thereon of great value, and this purpose is known to B at the time he makes the covenant of warranty, he ought to be held to contract with reference to this object,

and it would seem that a covenant of warranty of title and quiet enjoyment under such circumstances must be different in its obligation than such a covenant as applied to a piece or parcel of wild land, unoccupied and of little value.

Mr. Sedgwick (Measure of Damages, 164) says: "There seems great doubt whether sufficient attention has been paid to the words of the covenant. What is the meaning of the phrase of 'quiet enjoyment' in regard to a city lot for instance, which is of no use but for buildings, *on which erections must be contemplated at the time of the purchase by both parties*, and of which without such erections no enjoyment can be had. May not a distinction be well taken between this covenant applied to such property and to farming lands?"

It will be observed that this distinction is made by Mr. Sedgwick, where, from the nature of the conveyance and without any words in the deed, the parties must contemplate valuable improvements.

The plaintiffs invoke the distinction made by Mr. Sedgwick, and ask that it be applied to the deed in question. They contend that from the language of the deed itself, aside from the nature of the property conveyed, the vendor knew the purpose of the vendee in securing the conveyance, and knew that he intended to attach valuable improvements thereto, which would be of no value if the title to the property conveyed failed.

From the description in the deed it is true that the vendor knew that the vendee contemplated constructing a ditch whereby the purchase would be made valuable, and the vendor knew that it was necessary to construct a ditch from the right-hand fork to the left-hand fork before this water could be conveyed to Tucker gulch, and he knew that water for Tucker gulch was the object, and he knew that the vendee contemplated making a ditch from the right-hand fork to the left-hand fork, and the vendors fix the point of departure of such ditch. And, if we considered this an open question, we should say that the party having this knowledge must have contracted and entered into his cove-

nant of warranty with reference to this information, and that it formed one of the ingredients of the covenant, and was one of the necessary elements of the contract of warranty. Parties do covenant with reference to the subject-matter of the conveyance and with reference to the object of the conveyance, especially when that object is expressed in the deed. And if we did not feel controlled by the authorities, we should say that the vendor, knowing the purpose of the vendee, and that purpose being expressed in the deed, he entered into the covenant of warranty with reference to that purpose, and that this covenant would hold him to respond for such improvements. As if A should say to B, "if you will build a flouring mill upon this stream worth $10,000 I will warrant you the title to the water and the water right," and the mill should be built upon the strength of such warranty, and the title should fail, A should be held for the value of the improvements.

But we feel controlled and guided by a long course of decisions wherein the value of the land at the time of the conveyance, with interest and costs, is fixed as the measure of damages, and the distinction suggested by Mr. Sedgwick, if made at all, has been disregarded. Some definite, fixed and unalterable rule ought to prevail as to the measure of damages upon breach of warranty of title, and the one fixing the value of the lands at the time of the conveyance, with interest and costs, has been a long time adhered to, and it is now too late to make any departure therefrom.

The consideration in the deed is $2,000 in clean gold dust, and the averment in the complaint is that $2,500 in currency was paid as the consideration, and the plaintiffs ask damages for $2,500 as to this item.

Upon this proposition we say that where a contract is made payable in so many dollars' worth of specific articles of personal property, after demand and refusal to deliver the property, it becomes a contract to pay so much in money, and we hold that only $2,000 in currency could have been collected for the consideration in the deeds, and as a conse-

quence only $2,000 damages could be collected in this action, together with interest and costs.

And as to costs, we hold this: that the vendor not only warranted the title, but he promised to defend it. For what shall he respond under this promise to defend the title he grants? That the taxable costs in the suit to defend the title can be recovered under and by virtue of this covenant, does not seem to admit of much question; and that a reasonable counsel fee, as well as the taxable fee of counsel, can be recovered, was held in the case of *Ten Eyck's Executors*, and this seems to be the rule in Massachusetts, Maine, New Hampshire and Vermont. And the same reason that would authorize the recovery of the clerk's, sheriff's and other costs would also authorize and permit the recovery of reasonable counsel fees necessarily incurred in defending the title. The character of these expenses is the same. One is just as requisite as the other, and both are requisite to a defense, and we hold that both are recoverable for the same reason.

2. The next question relates to the sufficiency of the complaint. The defendants filed a demurrer thereto upon the ground that the deed in question was but a release; that the guaranty attached only to the grantors' interest in the property conveyed, and the grantors having no interest in the property at the time of the conveyance, the warranty is therefore void.

An inspection of the deed will show the following: "That the parties of the first part for and in consideration of the sum of $2,000 clean gulch gold dust to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, hath *remised*, *released*, and *forever quitclaimed* unto the said parties of the second part, and to their heirs and assigns all that certain water-right lying," etc. Then follows this clause of warranty: "and we hereby covenant and agree to warrant and defend the title to the same against all claims of all persons whomsoever, whether in law or equity."

By the words used in this deed, did the grantors convey

the water-right as upon bargain and sale, or did they simply convey their interest therein, whatever that interest might have been? It is suggested that in the conveyance of a mere possessory title where the party has not the title in fee, as in this case, that the words *remise*, *release* and *quitclaim* are the proper words to use in making such conveyance, but we wish to strip this question of every peculiar or local consideration, and to determine it upon the bare words used in the conveyance.

This deed must be taken as a whole and construed together, and every part and portion thereof must be made to harmonize with the whole, and effect must be given to every part, if possible, without violating any known rules of construction and interpretation. We must gather the intention of the parties from the whole deed. We cannot single out the words *remise*, *release* and *quitclaim*, and say therefrom that the grantors simply intended to convey their interest in the property, but these words must be construed in the light of the fact that an ample and full consideration was paid for the property, and that the title thereto was warranted. The warranty and the consideration paid are entirely inconsistent with the theory that the grantors intended simply to release the property, but on the contrary they indicate conclusively that the grantors intended to convey the property itself and the title thereto. And this view of the case is supported by a pure principle of equity, which would forever prohibit a party from receiving a full consideration for property, covenanting to warrant the title and still retaining the consideration, to declare that because he had conveyed *nothing* his covenant of warranty was worthless.

We have no hesitation in saying from this deed, that the grantors intended by it to convey the whole property therein described, and that when they received $2,000 therefor they supposed they were receiving the full price and value of such property, and this intention of the parties must be carried into effect if the words they use do not absolutely prohibit.

It will be noticed that the grantors do not remise, release and quitclaim all their right, title and interest in and to the property, but they remise, release and quitclaim *the thing itself*. There is a marked distinction between remising and releasing one's interest in property, and in remising and releasing the property itself; in the latter case the words, when supported by a full consideration, would be treated as words of bargain and sale, but in the former case the words would only convey the parties' interest, no matter what the consideration was. As if A should remise, release and quitclaim black acre to B, receiving from B the full value of the property, such conveyance would carry the absolute title, while if A should only remise, release and quitclaim his interest in black acre, B would only acquire such interest, although a full consideration was paid. We believe this distinction is supported by the authorities.

In *Lynch* v. *Livingston*, 2 Seld. 434, the words in the conveyance were "have remised, released, and forever quitclaimed, and by these presents do remise, release and quitclaim unto the said party of the second part," and the court of appeals say, "This was a good and valid bargain and sale. The *pecuniary consideration was adequate to support it as such*, and the words 'remise, release and quitclaim' were sufficient to raise a use in favor of Robert J. Livingston, the bargainee, which use the statute of uses transformed into possession."

In a case reported in the 11 Ill. 484, the court say, in speaking of a quitclaim deed: "Such a deed is just as effectual for the purpose of transferring real estate as a deed of bargain and sale, and had there been no other words in the deed under consideration, showing an intention on the part of the grantor not to convey the land in question, there can be no doubt that the plaintiff would have been entitled to recover."

And so in *Williamson* v. *Test*, 24 Iowa, 138, the court hold: "And notwithstanding the words 'sell, convey and quitclaim,' in the prior part of the instrument, the subsequent language warranting and defending the premises

against the lawful claim of all persons whomsoever, except the United States, would be without meaning, unless construed to hold the grantor, as claimed by plaintiff." See, also, *McNear* v. *McComber*, 18 Iowa, 12; *Morrison* v. *Wilson*, 30 Cal. 346; 5 Conn. 220.

So we say of the deed we are considering; the words warranting and defending the title against the claims of all persons whomsoever are without meaning, and were simply intended as a fraud and a deception, unless the words *remise*, *release* and *quitclaim* are construed as words of bargain and sale, and in giving these words such a construction we only carry into effect the clear and express intention of the parties.

The defendants contend that the words in the deed amount only to a quitclaim of the grantors' interest in the property, and, assuming this to be true, they cite the following authorities to support the proposition that when the deed purports to convey only the grantors' interest in the property, the warranty only attaches to the interest of the grantors, viz.: *Sweet* v. *Brown*, 12 Metc. 175; *Kimball* v. *Semple*, 25 Cal. 452; *Gee* v. *Moore*, 14 id. 472; *Blanchard* v. *Brooks*, 12 Pick. 47; *Powers* v. *Ware*, 2 id. 458.

If the assumption of the defendants were correct, then their authorities would be in point; but it is assuming the whole question to say that the words in the deed amount simply to a conveyance of the grantors' interest in the property, and we are satisfied that these words, in the light of the authorities cited, when supported by a full consideration paid and a warranty, are words of bargain and sale, and that the warranty attaches not to the grantors' interest, but to the property itself.

3. The next question arose upon the third defense set up in the answer. This answer substantially set forth that one Laird was the owner of the property in question, or of an interest therein; that he conveyed the same to defendants to indemnify them against a liability for him; that this liability had terminated, and ceased to exist; that plaintiffs applied to Laird to purchase this property, the title to

which was in defendants, and did purchase the same, paying the entire consideration therefor to Laird; that Laird then applied to the defendants to make to plaintiffs a deed of the property, which they did, and which is the deed in the complaint set forth, and that all these facts, at the time of making such deed by defendants, were known to plaintiffs.

It will be observed by the averments of the answer that the defendants were in fact trustees of Laird, holding the title for him, and it will be seen that one important element, whereby the deed in question was declared to be good and valid as a warranty deed, is wanting in the answer, viz., a consideration. The consideration passed to Laird; these defendants received nothing; they acted as machines in making the conveyance, and if the deed cannot be supported as a deed of bargain and sale without an adequate consideration received *by these defendants*, then it must fail; for as to these defendants, no consideration passed between the parties.

We apprehend that it was entirely immaterial to whom the consideration was paid. The question is, not whether Laird or these defendants received the consideration, but was the value of the property paid for by the plaintiffs? The fact that defendants were trustees for Laird cannot affect their liability. They acknowledge that they received $2,000 for the property and covenant to warrant the title, and if they immediately paid the money to Laird, to whom it belonged, that fact would not enable them to defend against their covenant.

Trustees are never under any obligation to make a personal covenant of warranty, but if they volunteer to do so their liability is precisely the same as if they were acting for themselves, and not as trustees.

Upon this subject Mr. Hill (on Trustees, page 790) says: "It has been already observed that trustees cannot be required to enter into any personal covenants for title in a conveyance of trust estate, beyond the usual covenant that they have not incumbered. But if they should enter into any such

personal covenants, they will be liable in an action at law by the covenantees in case of breach."

In *Greason* v. *Keteltas*, 17 N. Y. 491, the court of appeals holds as follows: "Although parties who act in respect to the property in their hands in the capacity of trustees only are not ordinarily under any obligation, in executing the duties of their trust, to enter into any personal covenants in relation to the trust property, yet when they voluntarily do so they are not only themselves bound to perform such covenants, but those who succeed to their rights as trustees are also bound, so long as they retain the control of the property to which they relate. See, also, *Sumner* v. *Williams*, 8 Mass. 162.

The facts set out in the third defense of the answer are not sufficient to constitute a legal defense to said action.

4. The final question relates to the acknowledgment of the deed. The acknowledgment is not in the form prescribed by the statute, and the defendants contend that this irregularity vitiates the deed as between the parties to the instrument.

Our statute provides (section 3, p 396): "Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved in the manner hereinafter provided." Section 6 provides: "No acknowledgment of any conveyance whereby any real estate is conveyed or may be affected shall be taken unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by oath or affirmation of a creditable witness."

It is admitted that the acknowledgment to the deed in question does not answer the requirements of the statute. Does such failure in the acknowledgment vitiate the deed as between the parties thereto?

The object of an acknowledgment, and the record of a deed affecting real estate relates to the rights of third persons

It is submitted that a deed as between the parties to the instrument is good and valid when signed, sealed and delivered, and the purpose of acknowledgment and record is for the protection of third persons. As between the parties a deed can be enforced without acknowledgment and without record. The acknowledgment is no part of the deed.

In the case of *Wood* v. *Owings*, 1 Cranch, 239, the supreme court of the United States holds, in considering a case under the Maryland statutes, which upon the subject of acknowledgment of deeds are similar to ours:

"It is a well-established doctrine of the common law that a deed becomes complete when sealed and delivered. It then becomes the act of the person who has executed it, and whatever its operation may be, it is his deed. The very act of living, which puts the paper into the possession of the party for whose benefit it is made, seems to require the construction that it has become his deed. Upon the most mature consideration of the subject, the opinion of the court is, that the words used in the act of Maryland, which have been recited, consider the instrument as a deed although inoperative till acknowledged and enrolled."

Following this decision we hold that the defect in this acknowledgment does not destroy the deed as between the parties thereto, and that as between such parties the deed would be good even without acknowledgment or record.

The questions we have considered in this opinion may be reduced to the following as a statement of the conclusions arrived at:

1. The intent of the parties must be gathered from what is written rather than from parol evidence, but the language of the instrument may be construed by the light of surrounding circumstances, and so far as possible the court may put itself in the place of the parties, and may interpret the language from this stand-point, but nothing can be added to or taken from the written words. Therefore no interpretation could be given to a deed whereby the words "Right-hand fork of Oro Fino gulch" in the descrip-

tion could be made to read "Left-hand fork of Oro Fino gulch." Extrinsic parol evidence can only explain ambiguous and uncertain words and phrases. Words direct, simple and certain cannot be explained by parol.

2. The measure of damages for breach of warranty in a deed is the value of the property at the time of the conveyance, together with interest thereon, and the necessary costs and expenses incurred in defending the title, and such costs and expenses include a reasonable counsel fee.

3. The words *remisė*, *release* and *quitclaim*, when supported by an adequate consideration and warranty of title, thereby showing the intention of the parties to have been to convey the property itself, and not the grantors' interest therein, are words of bargain and sale, and operate to convey the property described.

4. The grantors being trustees and holding the title for the benefit of third persons, and the consideration having passed to such third persons, does not affect their liability. They are liable on their personal covenants, notwithstanding their character as trustees.

5. The acknowledgment to a deed is no part of the deed, and as between the parties to the instrument a deed is good without acknowledgment, the acknowledgment and record being required for the protection and benefit of third persons.

The judgment of the court below is affirmed.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1873, HELD IN VIRGINIA CITY.

Present:
HON. D. S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, ASSOCIATE JUSTICE.

HARVEY, respondent, *v.* WHITLATCH et al., appellants.

PRACTICE—*verdict—judgment nunc pro tunc.* After a verdict has been rendered and the clerk has failed to enter judgment thereon at the proper term, the court can enter a judgment *nunc pro tunc* at any succeeding term, if the rights of third parties are not affected.

Appeal from the Third District, Lewis and Clarke County.

IN February, 1872, the court, WADE, J., ordered that judgment should be entered *nunc pro tunc* on a verdict rendered in July, 1871. The facts are stated in the opinion.

M. BULLARD, for appellants.

SHOBER & LOWRY, for respondent.
No briefs on file.

WADE, C. J. This case was tried to a jury, at the July term, 1871, of the district court for Lewis and Clarke county, and at that term an order was made that judgment be entered upon the verdict. The judgment was not entered in pursuance of this order At the February term, 1872, of said court, the plaintiff made a motion asking that judgment be entered *nunc pro tunc*, and judgment was entered accordingly. From the order causing judgment to be entered *nunc pro tunc*, the defendants appeal to this court. The failure to enter judgment upon the verdict, in pursuance of the order therefor, was an omission or mistake of the clerk of court.

There was no error in the entry of the judgment *nunc pro tunc*. The court is master of its own records for the purpose of correcting clerical errors, and whenever a clerk of court fails to enter judgment as ordered by the court to do, the court can cause such judgment to be entered at any succeeding term, provided such entry does not interfere with or affect the rights of third persons, and no such rights are presented or appear in this case.

Judgment affirmed.

CORNELL, respondent, *v.* LATTA, appellant.

PRACTICE — ***oral notice of appeal.*** **Section 370 of the Civil Practice Act requires a written notice of appeal, and an oral notice given in open court is insufficient.**

Appeal from the First District, Gallatin County.

IN November, 1872, Latta appealed from the decision of the court. SERVIS, J. The facts are stated in the opinion.

PAGE & COLEMAN, for respondent.

WADE, C. J. This was a case of forcible entry and detainer, tried before a justice of the peace, and appealed to the district court, and from thence appealed to this court. The respondent appears here and files a motion to dismiss the appeal, for the reason that no motion of appeal was filed with the clerk of the district court, and no copy of such notice was served upon the adverse party or his attorney. Section 370 of the Code provides that the appeal shall be made by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and serving a copy of the notice on the adverse party or his attorney.

The notice of appeal herein, as disclosed by the record, was an oral notice, given in open court. This notice does not, in any respect, answer the requirements of section 370, before referred to, and for this reason the case is dismissed from this court.

Appeal dismissed.

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ABANDONMENT.

Intention. The suspension of work upon a ditch, from July, 1865, to August, 1866, was not an abandonment, if there was no intention to abandon the same. *Atchison* v. *Peterson*, 561.

ACCOUNT STATED.

See PLEADING, 14.

ACTION.

1. *Undertaking on appeal — liability of sureties — defense to action.* If the sureties in a written undertaking on appeal agree to pay a judgment that has been rendered in the district court, if the same should be affirmed by the supreme court of the Territory, an action can be brought against one of the sureties when the judgment has been so affirmed; and in this action, the facts that an appeal has been properly taken from the supreme court of the Territory to the supreme court of the United States, and that proceedings have been legally stayed on the judgment, do not constitute a defense. *Bullard* v. *Gilette*, 509.

2. *Undertaking on appeal — void judgment for deficiency.* An action for the non-payment of a judgment cannot be brought upon an undertaking on appeal, providing for the payment of any deficiency arising upon the sale of mortgaged premises, if no judgment for such deficiency was rendered in the original suit. *Creighton* v. *Hershfield*, 639.

See ADMINISTRATOR; ILLEGAL FEES; REPLEVIN; SHERIFFS' RETURN; TERRITORIAL WARRANTS, 5.

ADMINISTRATOR.

An administrator cannot maintain an action of ejectment for the possession of realty, or trespass for damages to the same. *Carhart* v. *Montana Mineral etc. Co.*, 245.

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See PRINCIPAL AND AGENT.

AGENT.

Declaration of — authority. The declaration of an agent of a corporation, respecting his authority, is hearsay testimony. *Brown* v. *G. & S. G. & S. M. Co.*, 57.

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AGREEMENT.

1. *Situation of parties.* The situation of the parties to an agreement can be considered by the court to ascertain the meaning of the instrument. *Creighton* v. *Vanderlip*, 400.
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ASSAULT AND BATTERY.

Liability of parties. In an action to recover damages for an assault and battery the defendants are jointly and severally liable. *Daily* v. *Redfern*, 467.

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See CRIMINAL LAW, 1.

ASSIGNMENT.

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ATTACHMENT.

1. *Dissolution of.* The defective statement of a cause of action in the pleadings is not a ground for dissolving the attachment. *Cope* v. *W. M. M. & P. Co.*, 53.
2. *Affidavit.* An affidavit for an attachment, which sets forth that the amount is due "upon in part of both an express and implied contract," without specifying how much is due upon each contract, is sufficient; but this affidavit is not a model of pleading. Ib.
3. *Attachment law remedial.* The attachment law is a remedial statute, and must be liberally construed. Ib.

4. *Undertaking — contract of sureties.* The contract of the sureties in an attachment undertaking is in the nature of a guaranty that the principal will pay the costs and damages sustained. *Pinney* v. *Hershfield*, 367.
5. *Officer is trustee for creditor.* An officer that has levied upon property holds the same and receives an undertaking, if it is duly taken from his possession, as a trustee for the benefit of the attaching creditor. *Lomme* v. *Sweeney*, 584.

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ATTORNEY IN FACT.

Authority for appearance. The attorney in fact of a corporation, who is not its general managing agent, cannot appear in an action against it without special authority. *Lamb* v. *G. & S. G. & S. M. Co.*, 64.

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See TERRITORIAL AUDITOR.

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Indorsement of — bill of exchange — days of grace — protest. An instrument in these words,

"No. 4, HELENA, M. T., *May* 15, 1871.

[Stamp.]

"FOX & LYSTER, *Bankers*:

"Pay to Thomas Cotsworth, or bearer, twenty dollars.

"CHARLES HENDRIE."

Indorsed: "GEORGE STOKEY."

is not a bill of exchange, but a "check for funds deposited in bank," and is not entitled, under the laws of this Territory, to any days of grace, and the indorser is liable without any notice of its non-payment. *McDonald* v. *Stokey*, 388.

Characteristics of. A bank check is always drawn on a bank or banker, and is an absolute appropriation of a certain sum in the hands of the banker; it is payable immediately on presentation on the day designated, and presented only for payment, and is not allowed any days of grace. Ib.

BANKRUPTCY.

Preference to creditor. In this case the court found that a firm had committed an act of bankruptcy by giving preference to a creditor. *Story* v. *Nowlan*, 350.

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Mochon *v.* Sullivan, 470, affirmed. See Simonton *v.* Kelly, 483.
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See PRACTICE, 5, 45, 60.

CHATTEL MORTGAGE.

1. *Mortgagee loses lien after debt matures.* A mortgagee of personal property loses his lien thereon, as agent against a purchaser in good faith from the mortgagor in possession, after the maturity of the mortgage debt, although the mortgage is good and valid for one year after it is recorded. *Travis* v. *McCormick*, 148.
2. *Laches of mortgagee invalidates his lien.* In this case, the unexplained failure of the mortgagees to take possession of property, or foreclose their mortgage, two months after the maturity of their debt, was laches, and invalidated their lien, as against a purchaser in good faith. Ib.
3. *Duty of mortgagees.* The mortgagees of personal property should take immediate possession of the same after the maturity of their debt, or endeavor so to do with sufficient diligence. Ib.
4. *Issue of diligence.* It is a mixed question of law and fact to determine the issue respecting the use of due diligence by the mortgagee of personal property to obtain possession of the same. *Travis* v. *McCormick*, 347.
5. *Diligence — possession of property.* The mortgagee of personal property, who makes no effort to obtain the possession thereof, within a month after the maturity of his debt, does not use the diligence that is required by law. Ib.
6. *Sale of mortgaged property.* The owner of personal property that has been mortgaged, can sell or exchange the same without affecting the validity of the mortgage. *Davis* v. *Blume*, 463.

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Statute authorizing verdict by three-fourths of jury void. The act of the legislature of Montana, which provides that the verdict of three-fourths of the jurors shall have the same effect "as if agreed upon by the whole of the jurors," approved January 15, 1869, is unconstitutional and void in actions at common law, in which the value at controversy exceeds $20. *Kleinschmidt* v. *Dunphy*, 118.

See EQUITY, 2, 5; TERRITORIAL AUDITOR, 2; TERRITORIAL WARRANT, 3.

CONTRACT.

1. *Services — special contract — absence of employee.* A servant, who is employed under a contract for a certain time, at a fixed price, cannot recover on the contract for the services he has rendered, if he has left or been compelled to leave his employers through their conduct, before the stipulated time expires. *Isaacs* v. *McAndrews*, 437.
2. *Services — effect of special contract — time of service.* A party, who is employed under a written contract, as a superintendent of mines for five years, at a salary of $4,000 per year, but in which no time for its payment is fixed, must perform services for the period of five years, before he can bring an action for any part of his salary. Ib.
3. *Services — time of payment — salary.* If a written contract does not fix the time for the payment of a salary to a servant, who is to work for five years, at a certain salary per year, the law will establish such time at the end of the five years. Ib.
4. *Services — entire contract — remedies — party prevented from performing contract.* A party who is prevented from performing an entire contract by the other party has three remedies; he may keep himself ready, willing and able to perform the contract until it expires, and then sue on the contract, or sue upon the *quantum meruit* for what his services are actually worth, or sue for damages for breach of the contract by the other party. Ib.
5. *For Montana currency construed — salary for services.* Under a contract, which provides that a salary for services shall be at the rate of $4,000 a year, in Montana currency, allowing greenbacks to be worth 90 cents of the dollar of said currency, the amount of such salary is $4,000 per year. Ib.
6. *Place of performance and demand.* Under a contract that is made in New York to be performed in Montana, in which the place of payment for services is not fixed, a demand for payment must be made in New York, if the employers have their domicile there. Ib.
7. *Rate of interest after demand for payment for services.* In an action to recover for services performed in Montana, under a contract made in New York, which does not fix the rate of interest, if the payment for services is refused after a demand therefor in New York, the rate of interest would be that prescribed by the laws of this Territory. Ib.
8. *Charge on business — personal liability.* An agreement that the traveling and living expenses of a superintendent of mines shall be a charge to and borne by the joint property and business, makes them liens upon such property and business, but does not create any personal liability until the remedy against the property has been exhausted. Ib.

See EVIDENCE, 3; HUSBAND AND WIFE.

CONTRACT TO PAY GOLD DUST.

Promissory note — merger — agreement. A contract for the payment of gold dust, in the nature of a promissory note, is not merged in an agreement, by which the time for its payment is extended, the rate of interest reduced, and the means of paying it placed in the hands of the parties liable thereon; and this agreement cannot be introduced in evidence under the allegations of the answer that the agreement released the parties from any liability to pay the gold dust. *Creighton* v. *Vanderlip*, 400.

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When presumed correct. It is a presumption that the costs entered by the clerk, in a judgment, have been properly ascertained and taxed. *Warden* v. *Wheelock*, 49.

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See PLEADING, 16; PRACTICE, 70.

COUNTY BONDS.

1. *Validity of statute relating to county bonds.* The act approved November 22, 1867, authorizing county commissioners to call in all outstanding orders against the treasury of their respective counties, and issue bonds in lieu thereof is valid. *Thomas* v. *Smith*, 21.
2. *Power of commissioners in issuing county bonds.* The county commissioners of a county cannot require the holders of the evidences of its indebtedness to surrender the same. The act approved November 22, 1867, confers upon county commissioners the power to issue bonds in the place of outstanding orders which have been voluntarily presented for that purpose. Ib.
3. *Statute relating to payment of county warrants not repealed.* The act approved November 19, 1867, entitled "An act defining the duties of county treasurers, and the payment of county warrants," is not repealed by the act relating to county bonds, approved November 22, 1867. Ib.
4. *Duty of county treasurer — power of county commissioners.* The treasurer must pay, upon county warrants, money in the treasury of the county which is not otherwise appropriated by law. An order forbidding the treasurer to pay such warrants, passed by the county commissioners, is void. Ib.

COUNTY COMMISSIONERS.

See COUNTY BONDS.

COUNTY RECORDER.

Authority — stamps. A county recorder is not authorized to determine the value of gold dust described in a mortgage which is presented to him for record, and cannot know what stamp should be affixed thereto before he records it. *Griffith* v. *Hershfield*, 66.

COUNTY TREASURER.

See COUNTY BONDS.

COUNTY WARRANTS.

1. *Interest on, not indorsed by treasurer.* The neglect of the county treasurer to properly indorse a county warrant that has been duly presented to him for payment, does not release the county from its liability to pay the interest authorized by the statute, and the court will regard the indorsement as made, because it should have been made. *Territory ex rel. Largey* v. *Gilbert*, 371.
2. *Equity — maxim applied — mandamus.* An application for a writ of mandamus is an equitable proceeding; and the maxim in equity that "equity looks upon that as done which ought to have been done," is applicable to this case. Ib.

See COUNTY BONDS; STATUTORY CONSTRUCTION, 13, 14, 15.

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Cannot legislate — limitation. Courts cannot legislate and exempt parties from the operation of a statute of limitation, if the legislature has not made any exception. *Coady* v. *Reins*, 424.

See DISTRICT COURTS.

CRIMINAL LAW.

1. *Assault with deadly weapon — defense.* On the trial of a party indicted for an assault with a deadly weapon, with intent to inflict upon D. a bodily injury, it is not a defense, nor a part of the *res gestæ*, that D., before the assault was committed, had wrongfully deprived defendant of the use of water, and thereby prevented him from working his mining ground. *Territory of Montana* v. *Drennan*, 41.
2. *Extortion.* A person who demands and receives illegal fees as an officer, or under the color of his office, is guilty of extortion. *Ming* v. *Truett*, 322.
3. *Fornication.* Fornication is the carnal and unlawful intercourse of an unmarried person with the opposite sex. *Territory of Montana* v. *Whitcomb*, 359.
4. *Adultery.* Adultery is the unlawful sexual intercourse, or open and unlawful living together of a man and woman, when one or both of them are married, Ib.
5. *Evidence of fornication — unmarried.* A party, who has been indicted for the crime of fornication, cannot be convicted unless it is alleged and proved that he was unmarried at the time specified in the indictment. Ib.
6. *Evidence — conviction on confessions.* The testimony of a confession of guilt by the accused, which is not corroborated by any other evidence, is insufficient to sustain a conviction. *Territory of Montana* v. *McClin*, 394.
7. *Confessions to officers.* Confessions of guilt by the accused cannot be admitted in evidence, if they were not made voluntarily; and such confessions, made to an officer having the accused in custody, will be rejected if they were made after the officer had said that it would be better for him to confess his guilt. Ib.

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See MINING CLAIMS, 3, 4; MINING CUSTOMS.

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1. *Profits on resale of goods too remote.* The profits which might have been made by the resale of goods are too remote to sustain an action for specific damages. *Loeb* v. *Kamak*, 152.
2. *Measure of, for distraining rent illegally.* In an action to recover damages for the wrongful taking and conversion of money by another under a distress warrant for rent due from a third person, the party is entitled to recover the amount that was so taken and converted, with legal interest for its detention, and exemplary damages. *Bohm* v. *Dunphy*, 333.
3. *Awarding of exemplary — recklessness.* Exemplary damages are only given when a willful act is complained of, or there is either a wanton recklessness or a deliberate intention to injure. Ib.

See DEED, 3, 4; INJUNCTION, 2, 4, 6, 7; PARTNERSHIP, 6; PLEADING, 8; REPLEVIN, 2, 10, 11.

DAYS OF GRACE.

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See AGENT; EVIDENCE, 1.

DEED.

1. *Extrinsic evidence of ditches described.* In determining what property is conveyed by a deed, which describes the same as "the ditches known as the Silver Bow Company's ditches," "and more particularly known as the Humphrey and Allison ditches," the court should consider extrinsic parol evidence, tending to prove that the ditch known as the "Park ditch" was one of the said ditches; that it was necessary to convey the water to the said ditches; and that the said ditches would be of no value without the "Park ditch." *Donnell* v. *Humphreys*, 518.
2. *Description of property — fork of gulch — parol evidence.* Parol evidence is not admissible to show that the grantors in a deed, in which the property is described as "all the water of the right-hand fork of Oro Fino gulch," intended to convey the water of the left-hand fork of the same gulch. *Taylor* v. *Holter*, 688.
3. *Breach of warranty — measure of damages.* The measure of damages against grantors, who have warranted the title and agreed to defend the same in the deed, is the value of the property at the time the conveyance is made and interest thereon, and the necessary costs, expenses and reasonable counsel fees incurred in defending the title. Ib.
4. *Consideration — damages — gold dust — dollars.* In an action to recover damages for the breach of warranty in a deed, the consideration of which is "two thousand dollars in clean gulch gold dust," only $2,000 in currency can be collected as damages for the value of the consideration. Ib.
5. *Interpretation — consideration — words of bargain and sale.* The words "remised, released and quit-claimed" in a deed, in which the consideration is the full value of the property, and the grantors have warranted the title, are words of bargain and sale, which convey the property described. Ib.
6. *Acknowledgment.* A deed which is not acknowledged or recorded is good between the parties. Ib.

See PAROL EVIDENCE, 2; TRUSTEE.

DEFAULT.

See PRACTICE, 6, 7, 13, 26.

DEMAND.

See REPLEVIN, 4, 16.

DEMAND NOTE.

See PROMISSORY NOTE, 2.

DEMURRER.

See PRACTICE, 85.

DEPOSITION.

1. *When certificate is insufficient.* The certificate of a deposition, which does not state that the witness was sworn before giving his evidence, or that it was read to, or corrected by, the witness, is insufficient. *McCormick* v. *Largey*, 158.
2. *Taken by notary public of a State.* A deposition, which has been taken by a notary public in any State, cannot be read in evidence in the courts of this Territory. Ib.
3. *Presumption in favor of ruling of court below.* If the transcript does not contain the certificate of a deposition, this court will presume in favor of the court below that such certificate is insufficient, although the clerk says in a note in the transcript, "Here follows the proper certificate." Ib.
4. *Narrative form.* A deposition, which is taken in the narrative form is legal. Ib.

DESCENT.

Of quartz lodes. The statutes of this Territory, which regulates the descent and distribution of real property, are applicable to quartz lodes. *Carhart* v. *Montana Mineral, etc., Co.*, 245.

DISMISSAL OF ACTION.

A final judgment. **The dismissal of an action is, in effect, a final judgment against the plaintiff, although he has the right to bring a new action for the same subject-matter.** *Dahler* v. *Steele*, 206.

DISTRAINT FOR RENT.

See DAMAGES, 2; LANDLORD AND TENANT.

DISTRICT COURTS.

1. ***Not federal courts.*** **The district courts of this Territory, created by congress, are not federal courts contemplated by the constitution.** *Kleinschmidt* v. *Dunphy*, 118.
2. *Jurisdiction.* The district courts of the Territory, created by congress, are not courts of the United States. *Sanders* v. *Farwell*, 599.
3. *Equity — citizenship of parties.* The district courts of the Territory, exercising the jurisdiction of the circuit courts of the United States, have no jurisdiction of a suit in equity between citizens of the Territory. Ib.
4. *Equity* — The district courts of the United States have no jurisdiction to determine equity causes. Ib.

DIVERSION OF WATER.

See WATER RIGHTS, 2, 3; PLEADING, 6.

EJECTMENT.

Proof — title — possession. **In an action of ejectment, the plaintiff must prove that, at the time the suit was brought, the title or right to the immediate possession of the property was in himself, and that the defendant unlawfully withheld the possession of the same.** *Herbert* **v.** *King*, **475.**

See ADMINISTRATOR.

ENTRY AND DETAINER.

See PLEADING 20, 22.

EQUITY.

1. ***Trial of suit — decree — findings of jury.*** **A suit in equity is properly tried by the court that bases the judgment and decree upon the pleadings, evidence and proceedings in the case in accordance with its convictions, and without any regard to the findings of the jury upon questions that were submitted to aid the conscience of the court, or any other considerations.** *Gallagher* v. *Basey*, 457.
2. *Equity and law — power of legislature over proceedings.* The territorial legislature can prescribe the forms of proceedings in cases in equity and actions at law, but cannot destroy or blend together the separate and distinct jurisdictions of chancery and common law, which have been conferred upon courts by the organic act. Ib.
3. *Cases in equity — equitable defense — trial by jury — decree.* Cases in equity, in which equitable relief is demanded, and actions at law, in which an equitable defense is made, cannot be tried by a jury as at law, but the decree must be rendered by the judge, sitting as a chancellor in a court of chancery. Ib.
4. *Jury trial — void decree.* A decree, which is rendered upon the verdict of a jury in an equitable action, that has been tried as a suit at common law, is void. *Creighton et al.* v. *Hershfield et al.*, 639.
5. *Jurisdiction of courts under organic act.* The jurisdiction as to law and equity, of the courts of the Territory created by the organic act, are as separate and distinct as those that were known and defined at the time of the adoption of the constitution. Ib.
6. *Petition at law — trial — jurisdiction.* A court has no jurisdiction in this Territory to try a common-law action as a suit in equity; and it cannot try an equitable action as an action at common law. Ib.

7. *Foreclosure of mortgage—personal judgment.* **In an equitable action to foreclose a mortgage, a court cannot render a personal judgment against the mortgagors, and decree a sale of the mortgaged premises to satisfy such judgment.**

See COUNTY WARRANTS, 2; DISTRICT COURT.

EQUITY CAUSES.

See TRIAL BY JURY.

ESTOPPEL.

Denial of name—promissory note. **The maker of a promissory note is estopped from denying his name or that of the payee as it is written in the note.** *Kemp* **v.** *McCormick*, 420.

See MARRIED WOMEN, 3.

EVIDENCE.

1. *Declarations of one party made in absence of another.* **The declarations of** parties concerning a mortgage executed by them to one of the defendants, and made in the absence of this defendant, are admissible, if evidence has been introduced tending to show collusion between the parties respecting the instrument. *Kleinschmidt* v. *Dunphy*, 118.
2. *Exemplary damages—mitigation—legal advice.* In a suit to recover exemplary damages, a party can prove, as a mitigating fact, that he had acted in good faith under the advice of an attorney. *Bohm* v. *Dunphy*, 333.
3. *Proof of special contract.* A party who brings an action upon a special contract cannot recover, if he does not establish the contract, as alleged in his complaint, and prove that he has complied with its terms. *Simonton* v. *Kelly*, 363.
4. *Injury to the person.* In proving the actual injury caused by the unskillful treatment of a patient by a physician, it is competent to show all the facts resulting from the injury, from the time the right of action accrued to the verdict. *Coady* v. *Reins*, 424.
5. *Letter rejected as hearsay—replevin.* In an action to replevy certain cattle from a party who had traded mules for them, the plaintiff cannot introduce as testimony a letter that was written by another party to the sheriff, stating that he had a mortgage upon two of the mules, which were in the custody of the sheriff, under attachment. *Davis* v. *Blume*, 463.
6. *Appurtenance—grant.* Extrinsic evidence is admissible to show the nature and extent of an appurtenance, which passes with the principal thing granted. *Donnell* v. *Humphreys*, 518.
7. *General reputation of ownership—fraud.* Evidence of general reputation in the neighborhood, concerning the ownership of certain cattle by a married woman, is competent to rebut the allegation that she had conspired to deceive and defraud the creditors of her husband. *Griswold* v. *Boley*, 545.
8. *Replevin undertaking—defense of sureties.* It is not competent for the sureties, in a replevin undertaking, to prove that the owner had no attachable interest in the property, or that the attaching creditor was not injured by their failure to return the same. *Caldwell* v. *Gans*, 570.

See AGENT; CONTRACT TO PAY GOLD DUST; CRIMINAL LAW, 5, 6, 7; DEED; DEPOSITION; EXTRINSIC EVIDENCE; INDIANS, 3; INJUNCTION, 1, 2; PAROL EVIDENCE; PRINCIPAL AND AGENT, 1; QUARTZ CLAIM; TRESPASS.

EXCEPTIONS.

Allowance of—statement. Exceptions will be considered by this court if there is a statement at the beginning of the bill that the exceptions were taken at the proper time and allowed. *Territory of Montana* v. *McClin*, 394.

See PRACTICE, 11, 24, 39, 40, 50, 57, 58, 62, 80.

EXECUTION.

Issued for assignee of judgment—collection of. The court can direct an execution to be issued in favor of the assignee of a judgment, on motion and

proof of its assignment, but it cannot order the officer to collect an execution in a particular manner. *McGregor* v. *Wells, Fargo & Co.*, **142.**

See SHERIFF'S RETURN.

EXEMPLARY DAMAGES.

See DAMAGES, 3; EVIDENCE, 2; PARTNERSHIP, **6.**

EXTORTION.

See CRIMINAL LAW, 2.

EXTRINSIC EVIDENCE.

See AGREEMENT; DEED; EVIDENCE, **1, 2.**

FEDERAL COURTS.

See DISTRICT COURTS.

FORNICATION.

See CRIMINAL LAW, 3, 5.

FORFEITURE OF GOODS.

License. Goods were legally seized and forfeited under the laws of the United States, which were traded for in the Indian country in Choteau county, Montana, by persons without any license therefor from the United States. *United States* v. *One Hundred and Twenty-six Buffalo Robes*, **489.**

FRAUD.

See PROMISSORY NOTES, 4, 5, 7.

FRAUDULENT SALE.

Sale under execution set aside — fraud. The sale of property under an execution to satisfy a judgment for the foreclosure of a mortgage, after the judgment creditor has released one-half of the property from the mortgage and judgment, and received one-half of the judgment, is fraudulent and must be set aside by the court. *Collier* v. *Field*, 612.

GARNISHEE.

When protected by stay of execution. If an action is pending between M. and W., and W. is served with garnishment as the debtor of M. in an attachment suit subsequently commenced, the court should proceed with the first action to final judgment, and protect W., as garnishee, if necessary, by staying execution until the attachment suit is determined. *Marden* v. *Wheelock*, 49.

GENERAL VERDICT.

Special findings. A general verdict should not be set aside, unless the special finding is undoubtedly inconsistent with it. *Febes* v. *Tiernan*, **179.**

GRACE.

See BANK CHECK.

GOLD DUST.

See CONTRACT TO PAY IN GOLD DUST; COUNTY RECORDER.

GOVERNOR.

See TERRITORIAL AUDITOR, **4.**

GRANT.

1. *Of water ditch — rights and incidents.* The grant of a water ditch, by general words, includes the excavated channel, the rights to the water by which it is supplied and made valuable, and another ditch which conveys the water to it. *Donnell* v. *Humphrey*, 518.
2. *Appurtenance — grant of water ditch.* A water ditch cannot be appurtenant to another water ditch and pass as an incident thereto under a grant of the same. Ib.
3. *Part of subject-matter.* The law distinguishes between that which passes as an appurtenance, and that which passes as a part of the subject-matter. Ib.

GRANTOR.

See TRUSTEE.

HEARSAY.

See AGENT.

HIGHWAY.

See STATUTORY CONSTRUCTION, 18; MINING CLAIMS, 7

HUSBAND AND WIFE.

Void contract and judgment. A contract by which a party agrees to perform services for three persons, one of whom is his wife, and a judgment obtained thereon, are void at common law as between the husband and his wife. *Isaacs* v. *McAndrew*, 437.

See MARRIED WOMEN.

ILLEGAL FEES.

Recovery of. A civil suit to recover illegal fees, which had been demanded and received under color of office, can be brought against an officer who has not been convicted in a criminal action. *Ming* v. *Truett*, 322.

See CRIMINAL LAW, 2; INDICTMENT.

INDIANS.

1. *License to trade with — approval.* A party cannot trade with Indians in the Indian country under a license which has not been approved by the commissioner of Indian affairs. *United States* v. *One Hundred and Ninety-six Buffalo Robes*, 489.
2. *License to trade with, not transferable.* A license to trade with Indians in the Indian country is a personal privilege to the person therein named, and cannot be transferred to other parties. Ib.
3. *Settlements of white men.* Evidence that there are settlements of white men in a certain section of Montana, is not admissible to prove that it is not a part of the Indian country. Ib.
4. *Montana is Indian country.* All the country within the limits of Montana Territory is regarded as Indian country, under the laws of the United States regulating trade and intercourse with Indian tribes. Ib.

See FORFEITURE OF GOODS; STATUTORY CONSTRUCTION, 24–29.

INDIAN COUNTRY.

See FORFEITURE OF GOODS; STATUTORY CONSTRUCTION, 24–29.

INDIANS — TRADING WITH.

See FORFEITURE OF GOODS.

INDICTMENT.

Officer taking illegal fees. An indictment against a party for taking illegal fees as a justice of the peace, must allege that he was such officer. *Territory of Montana* v. *McElroy*, 86.

INDORSEMENT.

See BANK CHECK.

INDORSERS.

See PROMISSORY NOTE, 1.

INJUNCTION.

1. *Miners' dam to stop tailings.* It is not an abuse of discretion for a court to refuse to enjoin parties from building a dam upon their mining ground, to prevent tailings from injuring their property. *Nelson* v. *O'Neal*, 284.
2. *Evidence in suit on injunction bond—damages.* In an action upon an injunction bond, the obligors may prove the facts that entitle them to the injunction in mitigation of damages, if the injunction has been dissolved before the merits of the case have been adjudicated. *Stuart* v. *Miller*, 301.
3. *Dissolution of injunction—evidence.* The dissolution of an injunction before the case has been finally determined, is *prima facie* evidence that the injunction was improperly granted. Ib.
4. *Parties to bonds—damages apportioned.* All the parties to a bond that has been executed jointly should be brought into court, so that the damages claimed can be apportioned. Ib.
5. *Damages for lost time.* In an action to recover the damages caused by the wrongful suing out of an injunction, a party can recover the value of his labor for the time he was compelled to remain idle by being restrained from working his mining ground. *Campbell* v. *Metcalf*, 378.
6. *Bond—damages not recoverable—attorneys' fees.* In a suit upon an injunction bond, the expenses and fees of attorneys in the action in which the writ was issued cannot be assessed as damages sustained by the wrongful granting of the injunction. Ib.
7. *Damages—assessment and apportionment by jury—attorneys' fees.* If attorneys' fees are paid for all the services rendered in an action, including those performed in procuring the dissolution of an injunction, the party claiming damages must prove the amount of the fees that was so paid for procuring the dissolution of the injunction. A jury cannot apportion the fees paid in the action and find the value of certain services, without evidence of the same. Ib.
8. *Granting of—facts of case—refusal.* It appeared in this case that the head of a ditch was fifteen miles below certain mining ground; that the owners of the ditch, who were the first appropriators of the water, were compelled on account of the working of the ground, to construct and maintain a sand reservoir and use the water ten minutes daily to clean it, and employ, during this time, one man, who was also employed on the ditch for other purposes. The court held that the injuries complained of did not justify the granting of an injunction. *Atchison* v. *Peterson*, 561.
9. *Solvency of parties—damages.* An injunction will not be granted if the parties are solvent and the complainants have an adequate remedy at law by bringing a suit for damages. Ib.
10. *Remedy—injury.* Courts require a very strong case for the granting of an injunction which will cause more injury than it will remedy. Ib.

INTEREST.

1. *On judgments.* Judgments bear interest in the Territory at the rate of ten per centum per annum. *Griffith* v. *Hershfield*, 66.
2. *Compound interest—not allowed in equity.* Courts of equity will not allow compound interest, if the contract therefor and the original contract were made at the same time and before any interest was due, and a written agreement to pay such interest shall not be enforced. *Wilson* v. *Davis*, 183.
3. *Compound interest at common law.* The old common-law rule, which did not allow compound interest, has not been overruled in the United States. Ib.

4. *Territorial statute regulates simple interest.* The statute of this Territory, which establishes the rates of interest, relates to simple interest, and does not authorize contracts for compound interest. Ib.
5. *A contract for payment of compound interest not enforced.* A party who agrees to sell real and personal property upon the payment of a note, which stipulates that the interest shall be compounded monthly, if it is not paid, is required to convey the property on the payment of the principal of the note, and simple interest upon the same. Ib.
6. *Statutory construction — act prescribing the rate of interest.* Interest is a creature of the statute; and, under the laws of this Territory, the payment of interest for money paid, laid out and expended for another, cannot be enforced unless it is averred and proved that there has been unreasonable and vexatious delay. *Isaacs* v. *McAndrew*, 437.
7. *Statutory construction — act prescribing rate of interest.* Under the second and third sections of the "Act to prescribe the rate of interest," the legislature has given the parties to promissory notes the power to fix the rate of interest that may be collected, after the maturity of the note, as stipulated damages. *Davis* v. *Hendrie*, 499.
8. *Interest on contracts.* The second section of the act relating to interest fixes the rate of interest on contracts that are due, where there is no agreement as to the rate thereof, and does not affect contracts that are to become due. Ib.
9. *Promissory note — interest after maturity — damages — penalty.* A promissory note, in which the maker agrees to pay "interest after maturity, at the rate of four per cent per month until paid," is an agreement between the parties to liquidate the damages for a breach of the contract. This interest is not fixed as a penalty for the breach of the contract, and the agreement will be enforced by the courts. Ib.

See CONTRACT, 7; COUNTY WARRANTS; PROMISSORY NOTE, 8.

IRRIGATION.

See STATUTORY CONSTRUCTION, 6, 7.

JUDGMENT.

Jurisdiction. The judgment of a court that exceeds its jurisdiction is void. *Creighton* v. *Hershfield*, 639.

See INTEREST, 8, 16; PRACTICE, 20, 21, 22, 26, 42, 51–53, 62, 65, 93.

JUDGMENT NUNC PRO TUNC.

See PRACTICE, 94.

JURISDICTION.

1. An agreement of parties cannot confer upon this court jurisdiction which is not given by law. *Wilson* v. *Davis*, 98; *Sanders* v. *Farwell*, 599.

See DISTRICT COURT; EQUITY; JUDGMENT; PRACTICE, 19, 35, 36; VENUE, 3.

JURY.

Private knowledge of facts — verdict. A juryman must render his verdict according to the testimony legally produced in open court at the trial, and disregard his private knowledge or belief. *Territory of Montana* v. *Whitcomb*, 359.

See CONSTITUTIONAL LAW; TRIAL BY JURY.

LAND.

See TITLE TO LAND.

LANDLORD AND TENANT.

Distraint for rent superseded. The common-law right of distraint for rent is not applicable to the condition of this Territory, and has been superseded by the statutory remedies which have been given to the landlord. *Bohm* v. *Dunphy*, 333.

See DAMAGES, 2.

LEGAL ADVICE.

See EVIDENCE.

LEGISLATIVE POWER.

See EQUITY, 2.

LEX LOCI CONTRACTUS.

See CONTRACT, 6, 7.

LICENSE.

See STATUTORY CONSTRUCTION, 25.

LIEN.

See CHATTEL MORTGAGE; PARTNERSHIP, 2.

LIEN OF MECHANIC.

See MECHANIC'S LIEN.

LOCATION OF LAND.

Right of first. Law and equity give the first locator of land and claimant of water a sufficient quantity of water to irrigate his land. *Thorp* v. *Woodman*, 168.

See MINING CLAIM, 2, 3, 5, 6; MINING CUSTOMS, 2, 4.

MALPRACTICE.

See EVIDENCE, 4; STATUTE OF LIMITATION.

MANDAMUS.

See COUNTY WARRANTS, 2; PRACTICE, 1, 2.

MARRIED WOMEN.

1. *Record of separate property.* A married woman, who records with the register of deeds of the county in which she resides, a bill of sale of personal property and also a list of such property and its increase, complies with the statute exempting "the property of married women from execution in certain cases," and thereby notifies the world that the same is her property. *Griswold* v. *Boley*, 545.
2. *Property—husband—creditors.* A married woman, who has duly recorded her property, can make her husband her agent and give him the control and possession of the same without affecting her rights, or rendering the property liable for the debts of her husband. Ib.
3. *Silence about title—estoppel.* A married woman, who has duly recorded her property, is not estopped from asserting her rights thereto, if she was silent when her husband stated that he had the title to the same. Ib.

MEASURE OF DAMAGES.

See DAMAGES: REPLEVIN, 2, 10, 11.

MECHANIC'S LIEN.

1. *Accounts — appropriation of payments.* A person who performs labor for another under a contract, and is entitled to a lien for a part of said labor, and can have no lien for the remainder, can charge therefor under two distinct accounts. If the debtor, at the time of the payment of any sum, fails to appropriate the same to either of these accounts, the creditor can do so before he makes out and files his lien. *Christnot* v. *M. G. & S. M. Co.*, 44.
2. *Not lost by excessive claim.* A laborer does not lose his lien for the amount actually due, by claiming a lien for a sum in excess of that to which he is entitled, unless there is fraud connected with the transaction. *Nolan* v. *Lovelock*, 224.
3. *Excessive claims — fraud.* A party who, without any fraudulent intent, claims in his complaint and notice of lien a larger amount than that found to the court, does not destroy his lien for the amount actually due. *Mason* v. *Germaine*, 263.
4. *Assignment of.* The lien of a mechanic for labor that has been performed follows the assignment of the account of the labor. Ib.
5. *Common law — possession.* At common law, the lien of a mechanic for labor continued during the time the property remained in his possession, and was lost as soon as he parted with its possession. *Mochon* v. *Sullivan*, 470.
6. *Statutory remedy.* In this Territory, mechanics are entitled to liens for their labor under the statute, which makes them a charge upon the property for a certain period from the commencement of the labor and the liens are not affected by the possession of the property. Ib.
7. *Proceedings in equity.* The lien of a mechanic is in the nature of an equitable right, and must be enforced according to the rules and principles of a proceeding in chancery. Ib.
8. *Statutory construction — act relating to mechanics' liens — personal judgment.* The part of the act of the legislature "securing liens to mechanics," approved December 30, 1864, which authorizes the rendition of a personal judgment as at law, blends together law and equity in the same proceeding, and is void. Ib.
9. *Case affirmed.* The case of *Mason* v. *Germain*, *ante*, p. 263, deciding that the lien of a mechanic is not destroyed, if the court finds that the party has claimed, without fraud, more than he was entitled to, affirmed. *Black* v *Appolonio*, 342.

See PLEADING, 7; PRACTICE, 29; STATUTORY CONSTRUCTION, 8, 10, 11, 12.

MERGER.

See CONTRACT TO PAY GOLD DUST; PROMISSORY NOTE, 3.

MINING CLAIMS.

1. *Damages by custom — free tailings.* The first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch, and render valueless the mining claims of subsequent locators below them. *Lincoln* v. *Rodgers*, 217.
2. *No remedy for necessary injuries in working by first locators.* The first locators of mining ground can work it with reasonable care and diligence, and the necessary injuries resulting to subsequent locators would be *damnum absque injuria*. Ib.
3. *Boundaries of ground for tailings — custom — free tailings.* The boundaries of ground for the deposit of tailings must be distinctly defined by persons locating it, so that subsequent locators may know what ground is vacant. The custom of free tailings conflicts with this rule, and the defining of such boundaries would be useless. Ib.
4. *Possession of mining ground — presumption — mining customs.* It will be presumed, in the absence of evidence, that the parties in the possession of mining claims hold them according to the local rules and customs of the miners in the district. *Robertson* v. *Smith*, 410.
5. *Rules of miners — vested rights.* The right to occupy, explore and extract the precious metals in the mineral lands of the United States becomes vested in the party who locates these lands according to the local rules and customs of the mining district in which they are situated. Ib.
6. *Title to mining claims — rights of miners.* The fee in the land, on which mining claims are located, remains in the United States, but the right of miners are incident to the fee, and have been carved out of it. Ib.

7. *Vested rights of miners — compensation — highway.* Lands of the United States, in which miners have vested rights, cannot be taken for the public use for a highway, if there is no act of the legislature providing for a just compensation to the miners. Ib.

MINING CUSTOMS.

1. *Effect on common law.* The rules and customs of miners in a particular district are laws, and constitute the American common law on mining for precious metals. *King* v. *Edwards*, 235.
2. *Location of mining ground.* The rules and customs, which point out the manner of locating mining ground, are conditions precedent, which must be substantially complied with. Ib.
3. *Forfeiture presumed when miners fail to work their claims.* The rules and customs of miners, that require locators to do a certain amount of work upon their claims, are conditions subsequent; and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs. Ib.
4. *Re-location of forfeited mining claims.* Mining claims, which are forfeited, can be re-located by any person who complies with the rules and customs of the district in which they are situated. Ib.
5. *Construction of mining rules by courts.* Courts must construe mining rules and customs, and require the owners of mining ground to develop and work it, if consistent with law. Ib.
6. *Rules of a district not varied by those of another.* The rules and customs of the miners of one district cannot be introduced to vary those of another district. Ib.
7. *Mining laws presumed to be in force.* It is presumed that the written laws of a mining district are in force, and any custom that conflicts with them must be clearly proved. Ib.
8. *Mining districts changed — vested rights.* The extent of a mining district may be changed by those who created it, if vested rights are not thereby interfered with. Ib.
9. *Mining customs must be reasonable.* All mining rules and customs must be reasonable. Those which compel persons to perform labor in the district to represent their mining ground, which cannot be profitably worked without running a bed-rock flume to it from another district, are unreasonable. Ib.

See MINING CLAIMS, 4–7; STATUTORY CONSTRUCTION, 19.

MINING DISTRICT.

See MINING CUSTOM, 1.

MINING LAW.

See MINING PROSPECTING PARTNERSHIP; STATUTORY CONSTRUCTION, 4–7, 16 17, 19.

MINING PARTNERSHIP.

1. *Authority of partners in mining to hire laborers.* The law presumes that every member of a mining firm has authority to hire laborers and make the firm liable for their wages, if they are necessarily employed in working upon the joint property, and no evidence of such authority is required. *Nolan* v. *Lovelock*, 224.
2. *Liability for wages of laborers, with notice.* Laborers that are hired by one member of a mining firm cannot recover their wages from the firm, if they had notice of an express agreement that such a contract must be ratified by all the members. Ib.

MINING PROSPECTING PARTNERSHIP.

1. *How formed — rights of partners.* An agreement made between parties, by which some of them prospect for gold, and the others furnish money and provisions, for which they are to receive interests in the mining grounds that may be discovered, constitutes a prospecting partnership, and those who furnish the money and provisions are entitled to pre-empt and hold

mining claims under the laws of a district, which provide that claims shall be allowed the discoverers for their prospecting partners. *Boucher* v. *Mulverhill*, 306.
2. *Rules.* A mining prospecting partnership is not governed by the technical rules of the law of commercial partnership. Ib.
3. *Mining law regulating, valid.* The mining law of a district, which allows those who furnish money and provisions to the discoverers of placer gold mines, to hold claims without personally pre-empting them, is not against public policy, and should be upheld. Ib.

MINING RIGHTS.

Right of miners to channel of creek for water and tailings. Miners are entitled to the free use of the channel of a creek, so that the water will flow from their ground, but they have no right to fill the channel with tailings that will flow down upon the claims of other miners. *Nelson* v. *O'Neil*, 284.

See WATER RIGHTS.

MORTGAGE.

1. *Decree of foreclosure — rights of redemptioners.* A decree, which orders a sale of mortgaged premises to satisfy the aggregate amount of several mortgages on separate parcels of property, made to secure the payment of distinct debts of different sums, due at different times and bearing different rates of interest, and which does not preserve the rights of redemptioners, is void. *Rader* v. *Ervin*, 632.
2. *Assignment — seal.* The assignment of a mortgage is valid without a seal Ib.

See CHATTEL MORTGAGE; EQUITY.

MORTGAGOR AND MORTGAGEE.

See CHATTEL MORTGAGE.

MORTGAGE OF PERSONAL PROPERTY.

See CHATTEL MORTGAGE.

NAME.

See PLEADING, 15.

NEW TRIAL.

See PRACTICE, 11, 17, 26, 79, 80; STATUTORY CONSTRUCTION, 5.

NONSUIT.

See PRACTICE, 9, 72.

NOTICE OF PROTEST.

See PROMISSORY NOTE, 1.

OFFICER, EXTORTION BY.

See CRIMINAL LAW, 2; INDICTMENT, 86.

ORAL INSTRUCTION.

See PRACTICE, 5.

ORDER OF PROOF.

See PRACTICE, 84.

PAROL CONTRACT.

Name of principal. The name of the principal need not appear in the body of a parol contract. *Gerber* v. *Stuart*, 172.

PAROL EVIDENCE.

1. *Of writing not in existence.* Parol evidence of a writing, the existence of which is denied by one of the parties to the action, is admissible, if the court is satisfied that the facts constituting a foundation therefor have been proved. *Kleinschmidt* v. *Dunphy*, 118.
2. *Written instrument — deed — intention of parties — language.* Parol contemporaneous evidence is not admissible to contradict or vary the terms of a valid written instrument, but such evidence is competent to enable the court to ascertain the intention of the parties to the deed, and make certain the language respecting its subject-matter, and give effect to the deed. *Donnell* v. *Humphreys*, 518.

See AGREEMENT; DEED; EVIDENCE.

PARTIES.

See ASSAULT AND BATTERY; INJUNCTION, 4.

PARTNERSHIP.

1. *No accounting necessary if profits are not denied.* In an action to recover a certain sum as the share of the profits of a partnership transaction, a reference or accounting is not necessary, if the answer does not deny that such profits were made. *McCormick* v. *Largey*, 158.
2. *Partner has lien on joint property.* A partner, who contributes on account of the partnership business any sum in excess of his proportion over his copartner, has a lien upon the joint property for the sum so contributed. *Wilson* v. *Davis*, 183.
3. *Rights of partners after dissolution — sale of property.* The member of a partnership, who dissolves it by refusing to continue its business, cannot compel his partner to carry out one article of the copartnership, which stipulates that the excess of funds which either contributes, shall be paid out of the net earnings of the partnership property; and a court of equity can order the property to be sold to pay such excess. Ib.
4. *Agreement about profits and payment of debts — creditor.* A special agreement between two parties by which one of them is to receive one-third of the profits of a business for his services, and the other is to be liable for the debts, is no defense to an action commenced against them as partners by a creditor, who had no notice or knowledge of the agreement before the liability accrued. *Lomax* v. *Kinzing*, 290.
5. *Effect of plea of bankruptcy by one partner.* In a suit against a firm in which one partner files a plea of bankruptcy, the court properly directed a stay of proceedings as to him, and rendered a judgment for the amount claimed by plaintiff, to be enforced against the partnership property and the individual property of the other partner. Ib.
6. *Surviving partner can recover exemplary damages — evidence.* A surviving partner can recover exemplary damages for the wrongful conversion of partnership property; but personal matters that effect only the deceased cannot be given in evidence, although they might have been properly admitted in aggravation of the damages during his life-time. *Bohm* v. *Dunphy*, 333.

See MINING PARTNERSHIP; MINING PROSPECTING PARTNERSHIP.

PARTY.

See ASSAULT AND BATTERY; SHERIFF.

PERSONAL PROPERTY MORTGAGE.

See CHATTEL MORTGAGE.

PHYSICIAN.

See EVIDENCE, 4; STATUTE OF LIMITATIONS.

PLEADING.

1. *Complaint.* The allegation of the release of a debt due the plaintiff is sufficiently set forth in the complaint in this case. *Lee* v. *Hudson*, 84.
2. *Reply required if answer prays for relief.* An answer which contains new matters in avoidance needs no reply under the statutes of this Territory, unless it states facts that entitle the defendant to affirmative relief. *Caruthers* v. *Pemberton*, 111.
3. *Amount of damages in complaint not material.* The amount of damages claimed in a complaint is not a material averment under the civil practice act of this Territory. The plaintiff can recover the damages he proves. *Loeb* v. *Kamak*, 152.
4. *Trespass — allegation of force.* Actual force is not necessary to constitue a trespass upon land, and it is not necessary to allege, in actions in the nature of trespass, that the injury was forcible. *Febes* v. *Tiernan*, 179.
5. *Attorney's fees not recoverable under general prayer.* A reasonable attorney's fee will not be awarded to a party under a general prayer for a certain sum as damages and expenses in protecting "rights, remedies and equities." It should be specifically demanded. *Wilson* v. *Davis*, 183.
6. *Insufficient denial.* A denial that defendants "wrongfully and illegally" diverted certain water, is an admission of the act of diversion. *Harris* v. *Shontz*, 212.
7. *Complaint on mechanics' lien must state a contract.* The complaint of a party, who claims to have a lien upon mining ground, for labor performed, must state facts that constitute a contract, but is not necessary to name the contract. *Nolan* v. *Lovelock*, 224.
8. *Complaint — averment of express promise.* Under the civil practice act, a complaint should not set forth a promise which is implied from the facts alleged, but an express promise must be averred and proved. *Higgins* v. *Germaine*, 230.
9. *Answer denial of implied and express allegations.* The denials of the answer must controvert the express allegations of the complaint, and those that are necessarily implied from them. Ib.
10. *Denial of Indebtedness — issue.* In an action on an account for goods sold and delivered, a denial of the indebtedness raises no material issue. Ib
11. *Insufficient denials — issues.* An answer that "denies legally and lawfully" the allegations of the complaint, raises no issue of fact. *Territory ex rel. Fisk* v. *Rodgers*, 252.
12. *Insufficient denial.* The denial of an "unlawful and wrongful" diversion admits the fact of the diversion. *Toombs* v. *Hornbuckle*, 286.
13. *Complaint on attachment bond — allegation — damages.* In an action against the sureties on an attachment undertaking to recover the damages caused by the wrongful suing out of the attachment writ, the complaint must allege that the principal has not paid the damages. *Pinney* v. *Hershfield*, 367.
14. *Complaint — allegation of — account stated.* A complaint contains a sufficient allegation of an account stated, which sets forth that the parties accounted together on a certain day of, and concerning certain work and labor, the wages due therefor and the amounts paid thereon, and that it was found and ascertained that there was due the plaintiff a certain sum which the defendants then and there agreed to pay. *McFarland* v. *Cutler*, 383.
15. *Abbreviation of name of party.* A party can be described in a pleading by a known and accepted abbreviation of his christian name. *Kemp* v. *McCormick*, 420.
16. *Counter-claim to joint debt — promissory note.* In an action on a promissory note against two makers, who are jointly liable, one of them cannot plead as a counter-claim an individual debt due from the payee to himself, unless he alleges that the payee is insolvent, or an equitable ground of defense. Ib.
17. *Complaint for assault and battery — conspiracy.* In a complaint to recover damages for an assault and battery committed by two persons, it is not necessary to allege that there was any conspiracy or collusion between the defendants. *Daily* v. *Redfern*, 467.
18. *Complaint for assault and battery — absent party — conspiracy.* In an action to recover damages for an assault and battery committed by a party, at the instance of another, who was absent when the injury was inflicted, the complaint should allege that there was a conspiracy between the parties to make them liable. Ib.
19. *Failure to deny complaint.* The material allegations of the complaint are admitted if the answer does not deny them. *Bullard* v. *Gilette*, 509.

20. *Forcible entry — answer — issue of title.* In an action of forcible entry and unlawful detainer, an allegation in the answer that the defendant was in the actual possession of land and entitled to such possession, does not raise the issue of title. *Parks* v. *Barkley*, 514.
21. *Conclusion of law.* The averment in an answer, that a party is entitled to the possession of land, is a conclusion of law. Ib.
22. *Forcible entry — title — gist of action.* In the action of forcible entry and unlawful detainer, the question of title is an immaterial issue; and the gist of the action is the actual possession of the premises by the plaintiff, and his forcible ejection from the same by the defendant. Ib.
23. *Replevin — value of property.* In an action of replevin, the value of property must be alleged by the party that demands judgment for its value, if it cannot be returned. *Lomme* v. *Sweeney*, 584.
24. *Filing amended answer — discretion.* It is not an abuse of legal discretion in the court below to refuse to allow a defendant to file a second amended answer, if the affidavits do not show what the defense is, and why it was not made before. *First National Bank of Helena* v. *How*, 604.

See ATTACHMENT; PRACTICE, 88, 89; PROMISSORY NOTE, 7.

PRACTICE.

1. *Mandamus — appeal from order on referee's report.* No appeal lies from an order of the district court setting aside the report of a referee upon an application for a writ of mandate. *Thomas* v. *Smith*, 21.
2. *Mandamus — reference — must be determined by court.* The district court cannot refer an application for a writ of mandate, but must grant or deny the same before an appeal can be taken. Ib.
3. *Issues of law — waiver of.* Issues of law should be disposed of before issues of fact are tried; but this right is waived by a party who goes to trial upon the facts, without insisting upon a demurrer, which has been filed in the action. *Marden* v. *Wheelock*, 49.
4. *Intermediate proceedings reviewed.* On an appeal from a judgment, this court can review the intermediate proceedings and afford relief. Ib.
5. *Oral instructions — not error.* It is not error for a judge of the district court to give oral instructions. Ib.
6. *Default — how set aside.* A default can be set aside without showing excusable neglect, if the summons has been defectively served. *Brown* v. *G. & S. G. & S. M. Co.*, 57.
7. *Default — how set aside.* A default should not be set aside, if the service has been regular, without affidavits of excusable neglect or inadvertence, and also of merits. *Lamb* v. *G. & S. G. & S. M. Co.*, 64.
8. *Judgment on reserved verdict.* It is not error to enter judgment upon a verdict which has been reserved for consideration, on the motion of complaining party. *Griffith* v. *Hershfield*, 66.
9. *Nonsuit — plaintiff's motion to set aside.* A plaintiff can move to set aside a nonsuit, which has been entered with his consent, after it was evident that he could not recover on account of alleged error in the rulings of the court. *Conner* v. *McPhee*, 73.
10. *Review — matters not in record.* This court cannot review matters which are not presented in the record of the case. Ib.
11. *Statement — exceptions — new trial.* An order of the district court denying a motion for a new trial will be sustained, if there is no statement specifying errors, or bill of exceptions. *Anderson* v. *O'Laughlin*, 81.
12. *Motions under advisement.* It is not error for the district court to take motions under advisement from one term to another. Ib.
13. *Default set aside.* The setting aside of the default in this case was not an abuse of the discretion of the court below. *Loeb* v. *Schmidth*, 87.
14. *Appearance — waiver of summons.* A party appears generally in an action and waives a summons, if he comes into court, without limiting his object in so doing. *Kleinschmidt* v. *Morse*, 100.
15. *Appearance — signing stipulation.* The signing of a certain stipulation in this case was a general appearance. Ib.
16. *When judgment is not reviewed.* This court will not review a judgment when it appears from the whole record that justice has been done. *Carruthers* v. *Pemberton*, 111.
17. *New trial — newly discovered evidence — affidavits.* A new trial will not be granted on the ground of newly-discovered evidence, if the affidavits do not show what diligence was used to obtain it, and the evidence is cumulative. Ib.

18. *Findings of referee—not reviewed without testimony.* This court will not review the findings of a referee, if the testimony on which they are based is not made a part of the transcript. *Wilson* v. *Davis*, 183.
19. *Jurisdiction—this court examines nothing except decree of court below.* This court can only determine whether or not the decree of the court below should be affirmed, and cannot now consider the effect of the undertaking on appeal upon the order of the court below, for the sale of property. Ib.
20. *Judgment entered at succeeding term.* Judgment can be entered on a verdict at a term of the court succeeding that in which it was found by the jury, if the clerk has failed to enter the same. *Comanche Mining Company* v. *Rumley*, 201.
21. *Judgment—court can amend.* The court can amend a judgment at a term succeeding that in which it was entered, by inserting the names of the defendants that were specified in the verdict. Ib.
22. *Judgment against defendants individually.* Judgment can be entered against defendants individually, who are named and described in the complaint as a certain company, although they are not members of it, if the jury finds that they are liable individually. Ib.
23. *Objections not regarded without a statement.* This court will not regard objections that a verdict is against law and evidence, if there is no settled statement. *Davis* v. *Germaine*, 210.
24. *Objection not considered without an exception.* This court will not consider an objection that oral instructions were given to the jury contrary to the statute, if no exception was properly taken at the time. Ib.
25. *New trial—not granted if verdict has any support.* A new trial will not be granted if there is some testimony to support the verdict, although there is a preponderance of evidence against it. *Lincoln* v. *Rodgers*, 217.
26. *Default—judgment after appearance.* A default cannot be entered against a defendant, after he appears, but judgment can be rendered against him for want of an answer. *Mason* v. *Germaine*, 263.
27. *Intermediate orders reviewed.* On appeal from a judgment, this court will review intermediate orders that affect the judgment. Ib.
28. *Suits consolidated.* Suits cannot be consolidated, unless the parties are the same and the subject-matter can be joined. Ib.
29. *Mechanics' lien—one trial—one sale.* The rights of all the parties to an action that claim liens upon the same premises under the act "securing liens to mechanics and others," must be adjudicated in one proceeding, and the several liens of the parties should be satisfied out of the proceeds of the same sale of the incumbered property. Ib.
30. *Questions of fact not considered without the statement.* On appeal from an order refusing a new trial, questions of fact will not be considered, unless all the evidence is brought before the court in the statement. Ib.
31. *Errors not reviewed.* Errors of law that are immaterial or not properly specified will not be reviewed. Ib.
32. *Stipulation not in the statement.* The stipulation of attorneys, that is not embodied in the statement, will be disregarded on appeal. Ib.
33. *Presumption in absence of evidence.* This court will presume, in the absence of the evidence, that the court below found the facts correctly. Ib.
34. *Process, if court makes one a defendant.* No process is required when the court orders that a person be made a defendant, and all the parties to the action are charged with notice thereof. Ib.
35. *Probate judge cannot issue summons—jurisdiction.* A judge of the probate court has no power to issue and attest a summons under his own hand, if there is no law providing for a clerk or seal of the court, and no jurisdiction is acquired by such a summons. *Murphy* v. *Ames*, 276.
36. *Special appearance—jurisdiction.* The special appearance of a party for the purpose of moving to dismiss the action confers no jurisdiction upon the court. Ib.
37. *Appeal bond to supreme court of United States.* The bond on appeal from this court to the supreme court of the United States is the same as that required by the laws of congress and the rules of the supreme court of the United States on appeals from the circuit court to the said supreme court. *Mason* v. *Germaine*, 279.
38. *Conditions of bonds on appeal to stay execution of judgment.* The execution of a judgment for the sale of property to satisfy mechanics' liens is not stayed on appeal to the supreme court of the United States, unless the bond on such appeal is conditioned according to law, and executed to the respondents, and sufficient in amount to secure the liens decreed, the costs of suit the damages for the delay and detention of the property and the costs and interest on the appeal. Ib.

39. *Consideration of statement — exceptions.* This court will not consider a statement that has not been duly settled and certified, or exceptions that have not been duly presented and signed according to the statute. *King* v. *Sullivan*, 282.
40. *Review of exceptions to admission of evidence.* An exception to the admission of evidence upon a cross-examination will not be examined if all the evidence is not before the court. Ib.
41. *Verdict against evidence.* A verdict will not be set aside, as contrary to evidence, unless it is clearly unsupported by evidence. *Toombs* v. *Hornbuckle*, 286.
42. *Sham answer — judgment on pleadings.* If the answer does not raise a material issue it may be struck out as sham, or judgment may be rendered on the pleadings. *Lomme* v. *Kintzing*, 290.
43. *Verbal stipulation.* This court will not consider a verbal stipulation between the attorneys of the parties. *Rankin* v. *Campbell*, 300.
44. *Oral agreements.* The oral agreements of attorneys should be disregarded, although the clerk has entered them in the transcript on appeal. *Stewart* v. *Miller*, 301.
45. *Instructions that mislead not given.* The court will not give an instruction, that is correct, if it will mislead the jury. *Boucher* v. *Mulverhill*, 306.
46. *Agreed statement no part of judgment roll.* An agreed statement of facts, on which the case was tried and judgment rendered in the court below, forms no part of the record, and cannot be considered on appeal, unless it is included in the statement on a motion for a new trial, or saved in a bill os exceptions, or certified to by the judge as having been used on the trial. *Noteware* v. *Sterns*, 311.
47. *Finding of fact — admissions.* A note "not submitted for the reason that defendants conceded these facts," which was written by the judge at the trial in refusing to submit an issue to the jury, is not the finding of a fact stated in the issue, nor a record of its admission. *Taylor* v. *Stewart*, 316.
48. *Manner of admitting facts.* The admission of a fact during the trial must be made by the party, or his attorney, in a distinct and formal manner in open court, and imports verity. Ib.
49. *Refusal to submit issues.* It is error for the court to refuse to submit an issue to the jury on the ground that it is an admitted fact, if there has not been a solemn admission of the fact. Ib.
50. *Exceptions to reasons.* Parties cannot except to the reasons given by the court for its rulings. Ib.
51. *Judgment — presumption in favor of.* This court will presume, if the contrary does not appear upon the record, that the court below found facts sufficient to support the judgment. *Ming* v. *Truett*, 322.
52. *Judgment — conflicting evidence.* This court will not reverse a judgment, if the testimony is conflicting, although the weight of evidence appears to be against the finding of the court below. Ib.
53. *Judgment reversed for irrelevant instructions.* A judgment will be reversed if the instructions of the court below upon irrelevant and immaterial issues are erroneous, and calculated to mislead the jury. *Kinna* v. *Horn*, 329.
54. *Review of issues of law in defective answer.* This court will review on appeal an issue of law raised by a demurrer to the answer, which has been waived by the filing of a replication, if the answer is defective in matters of substance which cannot be cured by the verdict. *Bohm* v. *Dunphy*, 333.
55. *Continuance — diligence — affidavit and facts considered.* The refusal of the court below to grant a continuance will not be reviewed if there has not been a gross abuse of discretion. In determining what diligence has been used to obtain evidence, the court must consider not only the affidavit for a continuance, but facts within its judicial knowledge of the condition of the country and means of communication. *Black* v. *Appolonio*, 342.
56. *Conflicting evidence.* The judgment of the court below will not be reversed if the evidence is conflicting. *Travis* v. *McCormick*, 347.
57. *Taking of exceptions — presumption of time and manner.* This court will presume that exceptions were taken at the proper time, and in the proper manner, if the record shows that a party "duly excepted" to the refusal of the court below to give instructions. *Simonton* v. *Kelly*, 363.
58. *General exception not regarded.* A general exception which does not point out the particular error complained of will be disregarded if a part of the instructions is correct, Ib.
59. *Statement — specific errors.* A statement on a motion for a new trial is sufficient if it points out in an intelligent manner the specific errors relied on by the appellant. *Pinney* v. *Hershfield*, 367.

60. *Instructions — issues.* The court should not give instructions which will cause the jury to consider issues on which no evidence has been introduced. *Campbell* v. *Metcalf*, 379.
61. *Judgment if demurrer is illegally filed.* A party who withdraws his demurrer to a verified complaint, and obtains leave to file an answer thereto at a certain time, cannot then file another demurrer; but if another demurrer is filed, the court may disregard it and enter judgment for the want of an answer. *McFarland* v. *Cutter*, 383.
62. *Findings — no exceptions to interest.* This court will not review the computation of interest in the judgment, if no exceptions were properly taken to the findings of the court below. Ib.
63. *Dismissal of appeal — motion to re-instate.* An appeal that has been dismissed will not be re-instated on the motion of appellant, supported by his affidavit, showing that his neglect to perfect the appeal was caused by the verbal statements or agreement of the respondents. *Orr* v. *Harding*, 387.
64. *Motion for rehearing — equity — supersedeas.* The motion for a rehearing of an equity case by this court does not operate as a supersedeas, and the court below can enter a decree in accordance with the remittitur and mandate of this court, while the motion is pending. *Columbia Ins. Co.* v. *Holter*, 429.
65. *Stay of judgment — motion.* A motion for a new trial in an action at law does not stay the execution of the judgment. Ib.
66. *Remittitur recalled or stayed by justices.* The justices of this court, on a proper application in vacation or term time, can recall or stay a remittitur and mandate that have been erroneously issued out of this court. Ib.
67. *Granting of rehearing.* A rehearing in an equity case will not be granted after the court below has entered the decree of this court according to its mandate and remittitur. Ib.
68. *Rehearing — reversal of decision.* On a motion for a rehearing, this court will rarely, if ever, reverse its first decision, unless it has overlooked some decisive question, or the decision conflicts with a statute or controlling decision. Ib.
69. *Finding by the jury set aside — services.* A finding by the jury, that a party has performed services for one year, under a contract requiring him to superintend mines in this Territory, will be set aside, if the evidence shows that he left the Territory before the year expired. *Isaacs* v. *McAndrew*, 437.
70. *Withdrawal of counter-claim.* It is not error for the court to refuse to allow a party to withdraw his counter-claim, after the testimony has been closed and while the court is instructing the jury, unless manifest injustice would result to the rights of the parties. Ib.
71. *Verdict — evidence.* The verdict of a jury will not be disturbed if there is competent evidence to support it. *Davis* v. *Blume*, 463.
72. *Nonsuit — review of evidence.* In reviewing the ruling of the court below in granting a nonsuit, this court will consider every fact as proven which the evidence tended to prove. *Herbert* v. *King*, 475.
73. *Grounds for nonsuit.* A nonsuit should be granted if there is no proof to support a material averment of the complaint. Ib.
74. *Dismissal of appeal — motion to perfect appeal.* A motion to perfect an appeal from the probate to the district court, which was not supported by affidavits, and was submitted after the appeal had been dismissed and a final disposition of the case had been made, was properly overruled by the court. *McMullen* v. *Armstrong*, 486.
75. *Reasons of court.* A correct decision will not be reversed, although the court erred in its reasons for making the same. Ib.
76. *Presumption in favor of ruling of court below.* If the record does not contain the facts, this court will presume that a motion to dismiss an appeal was properly granted by the court below. Ib.
77. *Statement on motion for new trial — particular errors.* Under section 195 of the Civil Practice Act, the statement on the motion for a new trial must specify the particulars in which the evidence is insufficient, and a specification that "the evidence in this case does not justify the verdict," is too general and uncertain and will not be reviewed by this court. *Griswold* v. *Boley*, 545.
78. *Presumption — new trial — notice — specifications.* In the absence of any objection this court will presume that a notice of the motion for a new trial was given, although it does not appear in the record, and that the specifications of this notice are contained in the motion for a new trial. Ib.
79. *Statement — motion for new trial.* The specifications of error form a part of the statement, but they are separate and distinct from the motion for a new trial. Ib.

80. *Consideration of exceptions.* This court will not consider exceptions that were not taken at the proper time and duly served. Ib.
81. *Exceptions — instructions.* Exceptions to the charge of the court must be made to a specified portion thereof, before the case is finally submitted to the jury. Ib.
82. *Verdict — conflicting evidence — prejudice.* A verdict will not be disturbed that is fairly sustained by any testimony, although the weight of evidence is against it, unless it appears to be the result of passion, prejudice or fraud. Ib.
83 *Exceptions to proof.* Objections to the proof of special damages cannot be made in this court for the first time, if no exceptions were taken to the same at the trial in the court below. Ib.
84. *Order of proof.* The court can determine the order in which the proof shall be introduced. Ib.
85. *Demurrer — waiver of service.* The filing of a general demurrer to a bill in equity is a waiver of any irregularity in the service of the subpœna. *Sanders* v. *Farwell*, 599.
86. *Verdict — conflicting evidence.* The verdict of a jury will not be disturbed if there is a conflict in the evidence upon the material issues in the case. Ib.
87. *New trial — irregularities.* A new trial will not be granted on the ground of irregularities in the conduct of a party and his attorney during the trial, if it does not appear that the verdict was affected by the irregularities. *Kinna* v. *Horn*, 597.
88. *Amendments to pleadings.* Courts, in their discretion, can allow amendments to a complaint before the case is submitted to a jury, to make the allegations correspond with the proof. *Wormall* v. *Reins*, 627.
89. *Amendments to allegations not denied in answer.* In this action, to recover damages for mal-practice by a physician, the court did not abuse its discretion in allowing the plaintiff to amend the complaint, after the testimony had been closed, by striking out the words "fractured" and "broken," although the answer did not deny the allegation of the complaint, that the elbow and arm of plaintiff were "dislocated, put out of joint, disrupted, broken, fractured, wounded and bruised." Ib.
90. *Continuance after amendments during trial.* The court did not abuse its discretion in refusing a continuance, after the plaintiff had been permitted to make an amendment to the complaint during the trial, which did not present a new material issue. Ib.
91. *Assignment of errors.* This court will not review errors which do not point out wherein the evidence is insufficient to support the findings of fact. *Thorp* v. *Freed*, 651.
92. *Opinion — findings.* The opinion of the chancellor in an equitable action is not a finding of facts. Ib.
93 *Reasons for judgment.* A cause will not be reversed because the court rendered its judgment for erroneous reasons. Ib.
94 *Verdict — judgment nunc pro tunc.* After a verdict has been rendered and the clerk has failed to enter judgment thereon at the proper term, the court can enter a judgment *nunc pro tunc* at any succeeding term, if the rights of third parties are not affected. *Harvey* v. *Whitlatch et al.*, 713.
95. *Oral notice of appeal.* Section 370 of the civil practice act requires a written notice of appeal, and an oral notice given in open court is insufficient. *Cornell* v. *Latta*, 714.

See Dismissal of Action; Exceptions; Garnishee; General Verdict; Parol Contract; Rehearing; Replevin.

PRINCIPAL AND AGENT.

1. *Maker of promissory note — proof of agency — intention of parties.* In an action against a person who signed a promissory note, "Jas. Stuart, Gen. Mang. & Supt. St. L. & M. M. Co.," the defendants personal liability will not be presumed; and he can introduce evidence showing that he made the note for the mining company, of which he was the agent, and that it was the intention of all the parties that the company should pay the note, and that he was not to be held liable thereon. *Gerber* v. *Stuart*, 172.
2 *Fraud of agent.* The principal is liable for the fraud that has been perpetrated by his agent, who was acting within the scope of his authority. *Herbert* v. *King*, 475.
3. *Authority of superintendent of a flume.* Courts will not enlarge the authority of an agent, and the acts of a superintendent of a flume in constructing, repairing or superintending the same, are binding upon the principal; but

his acts and declarations upon matters that are foreign to the flume cannot affect his principal. Ib.

PROBATE JUDGE.

1. *Powers under town-site act.* The law which confers upon a probate judge the power to enter public lands for town sites and award town lots to the citizens, does not grant him any judicial powers, but prescribes his duties, which are ministerial. *Ming* v. *Truett*, 322.
2. *Compensation as attorney in his court.* A probate judge can practice as an attorney in his court, and is entitled to receive compensation for making applications for the entry of town lots and taking the affidavits to them at the request of his employer. Ib.

See PRACTICE, 36.

PROMISE.

See PLEADING, 8.

PROMISSORY NOTE.

1. *Notice of non-payment not waived by presence of indorser.* The presence of one of the indorsers of a note, when the holder presents it to the maker at maturity for payment, does not waive a regular notice of its non-payment to the indorsers. *Grant* v. *Spencer*, 136.
2. *Suit is a demand.* A promissory note which is payable "on demand," requires no other or previous demand than the commencement of a suit thereon. *McFarland* v. *Cutter*, 383.
3. *Merger.* A promissory note is not merged in an agreement which does not expressly defeat a right of action thereon. *Creighton* v. *Vanderlip*, 400.
4. *Consideration — fraud — defense.* Fraud that impeaches the consideration of a promissory note constitutes a defense to an action at law on the note. *First National Bank of Helena* v. *How*, 604.
5. *Fraud of maker and payee — vendor and vendee — defense.* A party who buys and receives from the possessor quartz-mill machinery, the title to which is in litigation, and makes his promissory note in payment of the same, commits a fraud on the vendor by delivering the possession of the property and executing a conveyance of his right thereto to another claiming the same, upon a demand without any legal compulsion, and cannot afterward plead as a defense, in an action brought on the note, the fraudulent conduct of the vendor in selling the property. Ib.
6. *Failure of consideration — delivery of property.* In an action to recover a promissory note, the maker does not show a failure of consideration by alleging that the payee had no title to the property, in payment of which it was made, if it appears that the maker had delivered to a claimant, without any legal necessity, the property which he had bought and received from the payee. Ib.
7. *Pleading — allegation of fraud.* In an action on a promissory note the allegation that a suit was corruptly and fraudulently dismissed, without setting forth the facts constituting the fraud, is immaterial. Ib.
8. *Interest until paid.* A promissory note, in which the maker agrees to pay a certain sum, "on or before" a certain day, "with interest at the rate of three per cent per month until paid," does not provide for the rate of interest after its maturity on that day, and the holder can then collect under the statute, interest at the rate of ten per centum per annum. *Collier* v. *Field*, 612.

See CONTRACT TO PAY GOLD DUST; ESTOPPEL; INTEREST, 9; PLEADING, 16 PRINCIPAL AND AGENT.

PROTEST.

See BANK CHECK.

PURCHASE-MONEY.

See AGREEMENT FOR BUYING LAND.

PURCHASE.

See CHATTEL MORTGAGE, 1.

QUARTZ-CLAIM.

Record — number of feet. The record of a quartz-claim, which does not specify the number of feet claimed by the pre-emptor, is admissible in evidence in this case. The number of feet need not be specified in the record of the claim. *Conner* v. *McPhee*, 73.

QUARTZ LODES.

See DESCENT.

REAL ESTATE.

See AGREEMENT FOR BUYING LAND.

RECEIVER.

1. *Pay taxed as costs.* A receiver of property in controversy in an action cannot recover judgment for his services against all the parties, by a motion in the original suit. He is an officer of the court, and his compensation should be allowed out of the property in his hands, or taxed as costs. *Hutchinson* v. *Hampton*, 39.
2. *No appeal from his appointment.* No appeal lies from an order of the district court for the appointment of a receiver. *Wilson* v. *Davis*, 98.

REHEARING.

Rule of court — terms of continuance. A party can make a motion for a rehearing under a rule of this court. It is not a right given by statute and this court can prescribe the terms on which a continuance of the argument on the motion is granted. *Columbia Mining Co.* v. *Holter*, 429.

See PRACTICE, 64, 67, 68.

RELEASE.

1. *Consideration — seal.* A release that is executed for a consideration and does not affect real estate, is valid without a seal. *Collier* v. *Field*, 612.
2. *Judgment — mortgage — release of one obligor.* The written release for a valuable consideration of one of the joint and several makers of a promissory note from all liability on the judgment entered in the district court thereon, and the mortgage securing the payment of the note, satisfies the judgment and releases all the judgment debtors and mortgagors. Ib.
3. *Repugnant proviso void.* The proviso in a release of one judgment debtor, which states that the liability of the other judgment debtors shall not be affected thereby, is repugnant to the release and void. Ib.

REMEDY.

Undertaking — judgment. A creditor can pursue one or both the remedies by a suit on the undertaking or an execution on the judgmennt. *Bullard* v. *Gillette*, 509.

RENT.

See DAMAGES, 2; LANDLORD AND TENANT.

REPEAL OF STATUTES.

See STATUTORY CONSTRUCTIONS, 15, 23

REPLEVIN.

1. *Return of property after verdict.* A judgment for costs and the return of the property follow a general verdict for defendant in a replevin suit. *Anderson* v. *O'Laughlin*, 81.

2. *Measure of damages — interest.* In an action in the nature of replevin, to recover certain mules and harness, a party is entitled to the property, and the value of its use, from the time he was deprived of it to the day of trial. Legal interest on their value, during the period of detention, is not the measure of damages. *Morgan* v. *Reynolds*, 163.
3. *Property returned if action is dismissed.* A judgment for costs and the return of property is properly rendered against a party who dismisses his action for the recovery of the possession of the property after he has obtained the same by means of the process of the court in the action. *Dahler* v. *Steele*, 206.
4. *Demand.* No demand for a return of property, which has been unlawfully taken, is necessary before the commencement of a suit therefor. *Griswold* v. *Boley*, 545.
5. *Undertaking — sureties — return of property.* The sureties in an undertaking in replevin are released from their obligation to return the property, if it is taken by due process of law, without their fault, and held or sold, so that a return is rendered impossible. *Caldwell* v. *Gans*, 570.
6. *Possession of property — attachment.* The proceedings in replevin give a right to the temporary possession of the property without any title, until the right of possession is tried and determined, and do not impair the lien of an attachment that has been levied on the property. Ib.
7. *Obligation of sureties.* The sureties in an undertaking in replevin must return the property after a judgment has been rendered for such return, if it is in their power so to do; and they are entitled to the property, if they pay the judgment in the suit in which the property has been attached. Ib.
8. *Compliance with — condition.* The condition of a replevin undertaking, to return the property, is complied with, if the sheriff acquires possession of the same under a subsequent attachment or execution. Ib.
9. *Judgment for return of property — value.* In an action of replevin, a judgment for the return of property, which does not fix its value, if a return cannot be had, is irregular, but not illegal or void. *Lomme* v. *Sweeney*, 584.
10. *Liability of sureties — damages.* The sureties in an undertaking for the claim and delivery of property, that is in the hands of a sheriff under the writ of attachment, are liable for the damages which may be sustained by the officer and the attaching creditor, by a failure to return the property. Ib.
11. *Parties — action for damages by creditor.* An action for damages against the sureties on a replevin undertaking, which has been executed and delivered to the sheriff, can be maintained by and in the name of the creditor that caused the officer to attach the property that has been replevied. Ib.
12. *Sureties — statute — judgment.* The liability of the sureties in a replevin undertaking cannot be extended by statute, or the judgment entered in the action. Ib.
13. *Contract of sureties.* The sureties in a statutory undertaking, for the claim and delivery of property, contract that the principal will return the property, and that they will pay any judgment that may be recovered against the principal. Ib.
14. *Evidence of ownership.* The defendants, in an action on a replevin undertaking, cannot show that the title is in a stranger. Ib.
15. *Sureties — writ retorno habendo.* The sureties in a replevin undertaking can be sued, if the property is not returned after a judgment therefor, before a writ *retorno habendo* has been issued and returned unsatisfied. Ib.
16. *Demand.* An action can be brought against the sureties in a replevin undertaking, before a demand has been made for a return of the property. Ib.

See EVIDENCE, 8; PLEADING, 23.

REPUTATION.

See EVIDENCE, 71.

RESCISSION OF CONTRACT.

See AGREEMENT FOR BUYING LAND.

RES GESTÆ

See CRIMINAL LAW, 2.

RIPARIAN RIGHTS.

See WATER RIGHTS.

SALE.

See FRAUDULENT SALE.

SEAL.

See MORTGAGE, 2; RELEASE.

SERVICES.

See CONTRACT, 1-4.

SHAM ANSWER.

See PRACTICE, 42.

SHERIFF.

Parties — liability. The acts of the sheriff in taking property are the acts of the parties to the suit, and the officer and parties are liable therefor. *Griswold* v. *Boley*, 545.

SHERIFF'S RETURN.

1. *Cannot be quashed by a motion.* The sheriff's return on an execution cannot be quashed by a motion and evidence of its illegality or falsehood. *McGregor* v. *Wells, Fargo & Co.*, 142.
2. *Remedy of injured party.* The party who is injured by a sheriff's return upon an execution, can maintain an action for damages against the officer. Ib.
3. *Annulled by court — payment of execution.* The court can annul the sheriff's return upon an execution, which shows that he has applied one execution in payment of another in his hands. Ib.

STAMPS.

1. *On gold dust contracts.* A writing stating that a certain quantity of gold dust is due, without specifying its value, and a mortgage executed to secure the delivery of the same, are not "instruments for the payment of money," under the act of congress requiring stamps to be affixed to them. *Griffith* v. *Hershfield*, 66.
2. *On mortgage and note.* It is legal to affix stamps to a note, or the mortgage executed to secure its payment, or both, if the amount on both is sufficient. Ib.

See COUNTY RECORDER.

STATUTE.

A statute cannot be varied by the agreement of parties. *Davis* v. *Hoeh* [illegible], 499

STATUTE OF FRAUDS.

Verbal promise to pay debt of another. The verbal promise of a party, who has a claim against a ditch, to pay the lien of another against the ditch, is not within the statute of frauds, and may be enforced in law, if the main purpose of the promise is to protect the private interests of the promisor, and the other party, in consequence of this promise, gives up his lien on the property and fails to sue and collect his debt. *Carothers* v. *Connolly*, 433.

STATUTE OF LIMITATIONS.

Malpractice — action against physician for damages. In an action to recover damages for the unskillful treatment of a fractured arm, the gist of the action is the negligence of the physician, and the statute of limitations begins to run from the time of the alleged negligence. *Coady* v. *Reins*, 424.

See COURTS; STATUTORY CONSTRUCTION, 20, 21.

STATUTORY CONSTRUCTION.

1. *Retroactive effect.* Section 6 of the act of congress, amending the organic act of this Territory, approved March 2, 1867, did not have a retroactive effect and give full force to a law from the date of its first enactment, which had been annulled by congress and re-enacted by a subsequent legislature of Montana. *Carpenter* v. *Rodgers*, 91.
2. *Meaning of said section.* In passing said section 6, congress gave to subsequent territorial legislatures the right to re-enact certain laws that had been annulled by congress. Ib.
3. *Historical facts referred to.* This court can refer to the history of the Territory to ascertain the proper construction of a statute which is ambiguous. Ib.
4. *Repugnant proviso void.* A proviso which is inconsistent with any reasonable intention of the assembly which passed it, and repugnant to the body of the act, is void. Ib.
5. *Act relating to grounds for refusing new trial is directory.* Section 196 of the civil practice act, requiring the court to state in writing the grounds on which a new trial is refused, is directory. The failure of the court to state such grounds in this case did not injure the appellants. *Grant* v. *Spencer*, 136.
6. *Statute regulating irrigation — award of commissioners void.* The powers conferred on commissioners to apportion water, under the fourth section of the act "to protect and regulate the irrigation of land in Montana Territory," approved January 12, 1865, are judicial, and cannot be granted by the legislative assembly. The award of such commissioners is void. *Thorp* v. *Woolman*, 168.
7. *Statute regulating irrigation — doctrine of appropriation.* The act regulating irrigation in this Territory recognizes the doctrine of the appropriation of water for irrigation, but limits the right and quantity to certain persons. Ib.
8. *Statute prefers liens of mechanics.* The act passed December 30, 1864, "securing liens to mechanics and others," gives preference to the liens of mechanics and material men over any incumbrance made after the building is commenced. WARREN, C. J., dissenting. *Mason* v. *Germaine*, 263.
9. *Act of congress relating to rights of ditch owners construed — water-rights.* Under section 9 of the act of Congress, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26, 1866, a person has no right to go upon the mining ground of another and construct his ditch through the same, without the consent of the owner, unless he shows a necessity therefor, and pays the damages resulting therefrom. It was the intention of congress to give the owners of water-rights the right of way over the public domain, for the construction of ditches, to make the water available for use. *Noteware* v. *Sterns*, 311.
10. *Law relating to mechanics' lien — remedial.* The act "securing liens to mechanics and others" should be strictly followed, but it is a remedial statute and should be liberally construed. *Black* v. *Appolonio*, 342.
11. "*Just and true account.*" Under the act "securing liens to mechanics and others," the words, "a just and true account," do not mean the exact account for which judgment may be entered, but an honest statement of the account by the party claiming the lien. Ib.
12. *Mechanics' lien — implied contract.* Under the act "securing liens to mechanics and others" a mechanic is entitled to his lien for the payment of his services, which have been performed under an implied contract. Ib.
13. *Act relating to interest on county warrants — indorsement of.* Under the statute entitled "An act authorizing county commissioners to pay interest on county warrants," approved February 8, 1865, the duty of making the indorsement, "not paid for want of funds in the treasury," on the warrant, devolves on the county treasurer; and the court, by a writ of mandate, can compel him to make this indorsement at the time the party was entitled thereto. *Territory ex rel. Largey* v. *Gilbert*, 371.
14. "*Not paid for want of funds.*" It was the intention of the legislature that the indorsement "not paid for want of funds in the treasury," should show that the county warrant had been presented for payment at a certain time, and that payment had been refused for want of funds in the treasury; it was not intended to be an arbitrary condition provided for the sole purpose of making county warrants draw interest. Ib.
15. *Act relating to payment of county warrants — act repealed.* The act entitled "An act defining the duties of county treasurers, and the payment of

county warrants," approved November 19, 1867, provides for the preservation of the order in which county warrants have been presented for payment, and repeals the act entitled "An act authorizing county commissioners to pay interest on county warrants," approved February 8, 1865, which provides for a different means of preserving such order. Ib.

16. *Mining act of congress—rights of miners.* Section 9 of the general mining act of the United States, approved July 26, 1866, grants to the proper persons an easement upon the mineral lands of the public domain, which they may appropriate according to the local rules and customs of miners in the mining district in which the same may be situated, and thereby legalizes the mining upon the public lands of the United States for the precious metals. *Robertson* v. *Smith*, 410.

17. *Grants to miners—implied right.* The grants made by congress in the mining law of July 26, 1866, should be liberally construed in favor of the grantee; and the grant of the right to occupy and explore the mineral lands of the United States carries with it the implied right to extract the precious metals found by the occupant and explorer. Ib.

18. *Grant by congress for highways—compensation.* Section eight of the general mining act of congress of July 26, 1866, grants to the public a right of way for the construction of highways over public lands, which have not been otherwise appropriated; but neither the county commissioners nor the territorial legislature can take land for highways in which miners have acquired vested rights, without giving a just compensation for damages to those rights. Ib.

19. *Reserved rights by congress—miners' customs.* The clause in section 1 of the general mining act of July 26, 1866, "subject to such regulations as may be prescribed by law," is a reservation of the right by congress to regulate by legal enactments the manner and conditions under which claims must be worked by miners. The clause in the same section, "subject also to the local customs or rules of miners in the several mining districts," relates to the rules, customs and regulations of miners regarding the location, user and forfeiture of mining claims. Ib.

20. *Statute of limitations—time enlarged.* The act of the sixth legislature amending "An act concerning limitations," approved February 9, 1865, governs all cases in which the right of action existed at the time of its passage under the first act, approved February 9, 1865, and enlarged the time within which the plaintiff could enforce her remedy from February 28, 1870, when she was barred by the first act, to February 28, 1873. *Coady* v. *Reins*, 424.

21. *Statute of limitations—validity of.* The act of the sixth legislature amending the "Act concerning limitations," approved February 9, 1865, relates to the remedy, is prospective in its effects and does not violate any vested rights. Ib.

22. *Organic act—"limited by law."* The phrase, "limited by law," in the ninth section of the organic act of the Territory, means that the mode and manner of proceedings may be controlled and governed by law. *Gallagher* v. *Ellis*, 457.

23. *Repeals by implication.* A statute, passed subsequently to another act which is incompatible with its provisions, repeals by implication the parts of the first act that are inconsistent with it. *United States* v. *One Hundred and ninety-six Buffalo Robes*, 489.

24. *Organic act—Indian intercourse act—rights of settlers.* The organic act creating the Territory of Montana gave permission to people to come to the Territory and bring the necessaries and comforts of life, and thereby repealed that part of the law of the United States which gives agents of the Indian department the power to expel persons from the Indian country, and prevent citizens from bringing within the Territory the necessaries of life. Ib.

25. *Organic act—Indian license.* The organic act does not repeal the law of the United States which requires persons to obtain a license to trade with Indians in the Indian country. Ib.

26. *Treaty with Blackfoot tribe—Indian country.* The fourth article of the treaty made in 1855 between the United States and the Blackfoot tribe of Indians (11 U. S. Stat. 657), makes that portion of Montana in which Camp Cook is situated, the home of the Blackfoot nation, and it is Indian country in the fullest acceptation of the term. Ib.

27. *Organic act—rights of Indians.* The first section of the organic act, relating to the rights of Indians in this Territory, protects the rights of person and property, which Indian tribes have acquired under treaties with the United States. Ib.

28. *Treaty with Blackfoot tribe—jurisdiction of Territory.* White persons living in the Indian country within the limits of Montana are subject to the laws of this Territory. The clause in the treaty of 1855, which gives the Indians of the Blackfoot nation the exclusive control over a certain region, was adopted to prevent the United States from interfering with the customs and tribal relations of that nation. Ib.
29. *Organic act—Indian regulations.* In the proviso of the first section of the organic act, the United States has expressly reserved the right to make regulations respecting the Indians within this Territory. Ib.

See INTEREST; MARRIED WOMEN; MECHANICS' LIENS, 8.

SUMMONS.

Proof of service—affidavits. The service of a summons should be proved by the return of the officer, or the written acknowledgment of the party served. It is improper practice to establish this fact by the affidavit of persons who were absent when the service was made. *Brown* v. *Gaston, etc., M. Co.*, 57.

SURETIES.

See ACTION; ATTACHMENT; EVIDENCE, 8; REPLEVIN, 5, 7, 10, 12, 13, 15.

SURVIVING PARTNER.

See PARTNERSHIP, 6.

TERRITORIAL AUDITOR.

1. *Appointment by governor and council.* Under the organic act of this Territory, the office of territorial auditor must be filled by the governor, who nominates and, by and with the advice and consent of the legislative council, appoints a person to fill said office. *Territory ex rel. Fisk* v. *Rodgers*, 252.
2. *Statute relating to election of auditor void.* The act approved November 16, 1867, which provides for the election of a territorial auditor by the legislative assembly and the voters of the Territory, conflicts with the organic act and is void; such an election confers no right upon the party claiming the office. Ib.
3. *Confirmation by council.* A person, who has been nominated by the governor to fill the office of territorial auditor, has no right thereto until the legislative council has confirmed the nomination. Ib.
4. *Governor cannot fill certain vacancies in office.* The governor has no authority from the organic act, or the legislative assembly, to fill a vacancy in the office of territorial auditor. Ib.
5. *Office of territorial auditor.* The legislative assembly has created the office of territorial auditor, and can abolish it. Ib.

TERRITORIAL CONTRACT.

See TERRITORIAL WARRANT.

TERRITORIAL WARRANT.

1. *How paid.* A territorial warrant duly issued, presented for payment and "not paid for want of funds," in July, 1867, and subsequently sold by the owner, could not be paid by the Territory in money or taxes, at its option, in July, 1868. *Langford* v. *King*, 33.
2. *No contract for their payment.* The statute in force in July, 1867, giving the holders of territorial warrants the right to pay taxes with them, was not a contract that they should be so paid. Ib.
3. *Validity of act relating to payment of taxes in money.* The act approved November 19, 1867, which deprives the holders of territorial warrants not issued in their names, of the right of paying taxes with them, is constitutional. Ib.
4. *When holder of territorial warrant has a vested right.* The holder of a territorial warrant, who presented it in payment of taxes before the passage of the act approved November 19, 1867, acquired a vested right to pay taxes with it. Ib.
5. *Territorial contracts have no legal obligation.* A citizen cannot sue the Territory and enforce its contracts. They have no legal obligation, but rest upon the good faith of the Territory. Ib.

TITLE.

See PLEADING, 20, 22.

TITLE TO LAND.

Prior appropriation. The first appropriator of land in this Territory acquires a title to the same, which is valid against all persons except the United States and its grantees. *Parks* v. *Barkley*, 514.

TRADING WITH INDIANS.

See FORFEITURE OF GOODS.

TRESPASS.

Presumed to be made with force. The law implies that an unauthorized entry, upon the premises of another, is made with force, and no evidence of such force is required. *Febes* v. *Tiernan*, 179.

See ADMINISTRATOR; PLEADING, 4.

TRIAL.

See JURY.

TRIAL BY JURY.

1. A trial by jury is a trial by a tribunal of twelve men, acting only with unanimity. *Kleinschmidt* v. *Dunphy*, 118.
2. The constitution does not secure the right of trial by jury in causes of equity jurisdiction, and the legislature of this Territory possesses the power to determine the number of jurors that can render a verdict in the trial of issues of fact arising in such causes. Ib.

See CONSTITUTIONAL LAW.

TRUSTEE.

Liability for personal warranty of title. The grantors of a warranty deed, who held the title as trustees for a third party, to whom the consideration was paid, are liable on their personal covenants in the deed. *Taylor* v. *Holter*, 688.

UNDERTAKING.

See ATTACHMENT, 4; REPLEVIN.

UNDERTAKING ON APPEAL.

See ACTION.

VACANCY.

See TERRITORIAL AUDITOR.

VENDOR AND VENDEE.

See AGREEMENT FOR BUYING LAND.

VENUE.

1. *Application for change.* The act of the legislature, regulating the place of trial in certain cases, approved December 6, 1867, gives a party the right to apply for a change of the venue of his case before the trial actually begins, although such application has been made and denied at the same term before the passage of this act. *Godbe* v. *McCormick*, 105.
2. *Venue act—jurisdiction.* This act, approved December 6, 1867, affects the mode of procedure, but does not divest the district courts of the common-law jurisdiction conferred upon them by the organic act of this Territory. Ib.
3. *Validity of the venue statute.* This act, approved December 6, 1867, is upon a rightful subject of legislation and valid. Ib.
4. *When changed—discretion of court.* The application for the change of the venue in this action was not addressed to the discretion of the court below. The statute is imperative, and the application should have been granted upon the payment of the costs. Ib.
5. *Effect of denying application.* If a court erroneously denies a motion to change the place of trial, the subsequent proceedings in the case are void. Ib.

VERBAL STIPULATION.

See PRACTICE, 34.

VERDICT.

See PRACTICE, 94.

WAGES.

See MINING PARTNERSHIP.

WARRANT.

See COUNTY WARRANTS; TERRITORIAL WARRANTS.

WATER-RIGHTS.

1. *Capacity of ditch.* The measure of the plaintiffs right to water in controversy in this case is the number of inches that their ditch would convey from the point of diversion without running over its banks. *Coruthers* v. *Pemberton*, 111.
2. *Action for diversion of water — practice — judgment on verdict on the material issue.* In an action to recover damages for the diversion of water and obtain decree of title and perpetual injunction, the verdict of the jury that plaintiff is entitled to the water is a finding on the material issue, and entitles him to a judgment for costs and the relief sought. *Harris* v. *Shantz*, 212.
3. *Change of point of diversion.* If H. appropriated the water of a creek at a certain point in 1865, and C. appropriated the same water above H., in 1867, for the use of a mill, and returned the water into the creek so that H. had the benefit thereof, H. has no right to change his point of diversion of the water in 1869 and appropriate it above C.'s mill, and thereby deprive C. of the use of the water. *Columbia Mining Co.* v. *Holter*, 296.
4. *Claim to water — appropriation — possession.* A party who intends to claim water must appropriate the same with reasonable diligence by some known means, and at a certain point; a declaration of such a claim, without any acts of possession, is insufficient. Ib.
5. *Legal and equitable relief.* Legal and equitable relief cannot be obtained in the same proceeding, and a judgment for damages for the diversion of water, and which perpetually enjoins parties from using the water, is irregular and void. *Woolman* v *Garringer*, 535.
6. *Change of place of use and purpose.* The prior appropriator of water for mining purposes at a certain point can extend his ditch and use the water, to the extent of his appropriation, at any other point for the same or a different purpose. Ib.
7. *Date of appropriation — diligence.* The appropriation of water by parties, who prosecute the work on their ditch with reasonable diligence, dates back to the commencement of the work. Ib.
8. *Notice of change of use by appropriator.* The prior appropriator of water, who posts notices of his appropriation near the stream and immediately constructs his dams and ditches, is not required to give any actual notice to subsequent appropriators of his intention to extend his ditches, and reclaim the waste-water from his mining operations, and use the water at another place. Ib.
9. *Subsequent appropriator — abandonment.* The subsequent appropriator of water, who acquires the privilege of using the waste-water of the prior appropriator, can be deprived of the same at any time, unless the water has been returned into the original channel without any intention of recapture. Ib.
10. *Prior appropriator — quantity and quality.* The first appropriator of water for mining purposes is entitled to the same, as against subsequent appropriators, without material interruption in the flow thereof in quantity or quality. *Atchison* v. *Peterson*, 561.

See INJUNCTION, 1, 8; GRANT; LOCATION OF LAND; PLEADING, 6; STATUTORY CONSTRUCTION, 6, 7, 9.

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